

The Fourth PART
OF
Modern Reports,
BEING A
COLLECTION
OF SEVERAL
SPECIAL CASES
Argued and Adjudged
IN THE
COURT
OF
King and Queen's Bench :

In the 2d, 3d, 4th, 5th, and 6th Years of
the Reigns of King *William* and Queen *Mary*, and
7th Year of King *William*, and Judgments thereupon;
with several of the Pleadings at large; being care-
fully examined by the Records.

AND ALSO

The *Number-Rolls* of most of the other CASES.

The Second Edition, carefully revised, with the Addition of
a great Number of References never before printed.

Collected by a Learned Hand.

In the SAVOY:

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T H E

P R E F A C E.

BEFORE I give an Account of the following Cases, I shall mention something of *Reports* in general.

We have no printed Cases of the ancient Proceedings either in the Sheriffs Torn, or in the County-Courts; the Reason whereof may be, because Justice was then administred in a Summary Way, and *de plano*.

Neither have we any for above one hundred Years after the Courts of Law were settled in *Westminster-Hall*; which was about the later End of King *John*.

But in the Reign of *Ed. 3.* when the Professors of the Law (as my Lord *Coke* observes) were excellently Learned, and when Serjeants drew their own Pleadings, then (as he farther mentions) Jangling and Questions did arise, and Exceptions were taken more to Form than Matter. It was then our Book-Cases began, and have been continued ever since.

And it is necessary it should be so, because the Opinions of Lawyers are generally guided by those of their Predecessors, in which they seem to imitate the ancient *Prators*, who established their Judgments, not so much upon their own Reason, as upon the written Laws of the Empire.

'Tis true, it was the Complaint of that Learned Person before-mentioned, that he liv'd in a scribbling Age, and that *Quotidie plus, quotidie pejus scribunt*; yet he wrote on.

And so has the Collector of these Cases, who for several Years attended that Court in which they were adjudged, and has not only compared them with the Records, but was assisted in the Special Pleadings by a very able Clerk, who was particularly concerned in them.

The P R E F A C E.

Some, and but a few of them, are reported by others, and recommended by a great Name in the Title-Page, which is a certain Advantage to the Bookseller, whether 'tis so to the Reader or not ; but 'tis the Benefit of the Reader which is chiefly intended by these Papers.

The Quotations in the Margin have been carefully examined with the Books, and out of the great Number of Authorities which are usually cited at the Bar, none are here inserted but such as seem pertinent to the Case in Question.

And that nothing might be wanting to this Work, a much more than usual Care has been had in the Correction of it ; and the nice Examination of the Rolls, however troublesome and expensive, has been perform'd perhaps beyond what has been done in most Books of this Nature. So that it may well be hoped that those few Mistakes, which possibly have escap'd the Press, may easily be corrected ; as well as those of the Author, which he believes not to be any where material ; but has not the Vanity to think himself not obnoxious to Errors, as all Mankind must always be.

Vale.

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D E

Term. Sancti Hill.

Anno 2 Gulielmi & Mariæ Regis &
Reginæ Angliæ, &c. 1690.

Symonds *versus* Cudmore.

An Ejectment was brought for one Messuage, one Curtilage and Garden, in the Parish of St. Paul in the City of Exon, on the Demise of Nicholas Martin, &c. 1 Salk. 538.
2 Salk. 619.
1 Showet
370.

Upon Not guilty pleaded, the Jury found a special Verdict; that Sir Nicholas Martin being Tenant for Life, with Remainder in Tail to William his eldest Son, and having a Power to make Leases for 21 Years, or three Lives, reserving the antient Rent, did make a Lease to Clement Westcome for 99 Years, if Richard and Nicholas Westcome should so long live, reserving the antient Rent, which was 8 l. 10 s. per Annum.

Sir Nicholas Martin died leaving Issue William Martin his eldest Son and Heir, who being then seised of the Remainder in Tail; and also of the Reversion in Fee expectant upon the Determination of that Estate, did by Indenture release the said Rent, and before the Determination of the aforesaid Lease made by his Father, did demise the Premises to Elizabeth Westcome for 99 Years, if George and William Westcome should so long live, to commence after the Determination of the first Lease.

William Martin died leaving Issue Nicholas Martin his eldest Son and Heir, who being the Issue in Tail, levied a Fine to the Use of himself, and his Heirs.

Afterwards the first Lease determined, then Nicholas Martin entred, and made a Lease to the Plaintiff Symonds, upon whom Cudmore the Defendant, being the Assignee of the second Lease, entred; and, Whether his Entry was lawful? was the Question.

B

Those

Those who argued for the Plaintiff would have the Estate-tail in being; and that tho' it might be barred by the fine, yet it was not extinct; therefore they would not have the Lease void, but voidable by the Issue in Tail, and that the Cognizee of the fine might avoid it as the Issue in Tail might have done if the fine had not been levied.

They argued that at the Common Law all Estates of Inheritance were in fee; and before the Statute De Donis, the Donee had a fee-simple conditional, and might have barred his Issue.

13 E.1. cap. 1. That by the Statute De Donis, &c. called Westm. the 2d, the Common Law was altered, which Statute was made for the benefit of the Issue by restraining the Tenant in Tail, either before or after Issue born, to bar or change the Estate.

4 H.7. cap. 24. 32 H. 8. cap. 34. 'Tis true, if he had made a feoffment with Libery, it would work a Discontinuance of the Tail, because he had an Estate of Inheritance, and in such Case the Issue in Tail must have brought his real Action: But now by subsequent Statutes, Power is given to Tenant in Tail to bar his Issue by fine.

1 Inst. 23. b. 44 E. 3. 21. 46 E. 3. 4. If this Lease would not be voidable, then it would be good as long as any of the Issue in Tail are living, but that cannot be, because 'tis not for the Benefit of such Issue that it should be so; and for this Reason the Books are very plain, that Alienations made for their Benefit and not to their Prejudice, are binding.

1 Inst. 46. b. Admitting it therefore to be voidable by the Issue in Tail, then the Cognizee in the fine must have the same Power to avoid it as the Issue in Tail had before the fine levied: and to prove this, they relied on my Ld. Coke's Comment on Littleton; that if Tenant in Tail makes a Lease for forty Years, reserving Rent, to commence 10 Years after, and dies, then the Issue in Tail enters and makes a feoffment to B. the 10 Years expire, and the Lessee enters, and B. accepts the Rent, and waves the Possession of the Land; this makes the executory Lease good, because he shall have the same Election as the Issue in Tail had, either to make it so or avoid it.

Object. It may be objected in this Case, that the Lease made by the Tenant in Tail, never commenced till after the fine levied by the Issue; and therefore it could not arise out of the Estate Tail, because it was extinguished by the fine, and that if it arise out of any thing, it must be out of the Reversion in fee.

Ans.

Ans^w. Which Opinion may receive this Answer; That the Estate-tail was not extinguished by this Fine, because the Law will suppose an Existence of it in the Cognizee to prevent a Wrong; and therefore where such an Estate is intermixed with a Fee, it shall have a Being against this wrongful and tortious Lease.

In Errington's Case there seems to be an Opinion against this, the Case was this: R. and Katherine his Wife were Tenants in Special Tail, Reversion in Fee to R. who died; the Issue in Tail, who had also the Reversion in Fee in the Life-time of K. his Mother, made a Lease for 40 Years to J. S. to commence after the Death of K. his Mother, and dies, the Reversion descended to Jane, who in the Life-time of K. levied a Fine; the Mother died: The Cognizee of the Fine shall not avoid this Lease, because he who made it was inheritable to the Estate-Tail, and likewise to the Reversion in Fee, and so it issues out of both; for being actually seized of the Fee-simple he charged the Reversion, and the Lease is good against him by way of Estoppel, and by way of Interest also out of the Reversion, and the Estate-Tail is not only barred, but extinct by the Fine.

But there was no Judgment given in that Case; my Ld. Coke was there of a contrary Opinion to Justice Flemming: And in Capell's Case, which was adjudged in the 23d Year of the Queen, and published in his first Book of Reports, there is a contrary Resolution; it was this: The Remainder-Man in Tail granted a Rent-charge, and the Tenant in Tail suffered a Common Recovery, and having aliened the Estate died without Issue, the Grantee distrained for Rent, and the Alienee replevied; and it was held that the Title was in him, because the Common Recovery suffered by the Tenant in Tail did bind all the Remainders, and all Leases made by them.

Econtra. Those who argued for the Defendant said, That the Lease for Years was not to be avoided by the Issue in Tail, because it ariseth even out of the Estate-tail, and likewise out of the Reversion; and therefore it must be a good Lease, tho' the Tail might be barred by the Fine; for it was made by William Martin when he was Tenant in Tail, and for that Reason 'tis not void against his Issue; but the Issue having levied a Fine the Estate-tail is then extinct, so that the Cognizee cannot come in Privily of it being a meer Stranger, and therefore shall not avoid this Lease.

2 Cro. 688.
Bridg. 27. id.
1 Roll. Abr.
843. id.
Hob. 258.

Cro. Eliz.
253.
Roll. Rep.
idem, 19.

If Tenant for Life and Remainder in Tail join in a Lease to A. for Life, Remainder to B. for Life, rendering Rent, the Tenant for Life dieth, and the Remainder-man accepts the Rent of the first Lessee for Life and dieth, and the Issue in Tail enters, and accepts the Rent likewise, and makes a feoffment and levieth a fine to S. who bought the Land, then the first Lessee for Life died; it was held that the Purchaser should never avoid this Lease in Remainder, because it ariseth out of both the Estates of the Tenant for Life, and him in Remainder in Tail, and therefore the Acceptance of the Rent by the Issue in Tail made good both the Estate for Life to A. and also the Remainder to B. for Life.

There is a Case which governs this at Bar, it was adjudged in the Court of Common Pleas in Trinity Term, 3 Caroli, upon a Demurrer in Replevin, and it was shortly thus:

Cro. Car.
103.

The Father was Tenant for Life, Remainder in Tail to his Son, Remainder in Tail to the Father, Remainder in Tail general to the Son, Remainder in Fee to the Father, they both granted a Rent-charge by Deed to the Defendant in Fee, then they joined in levying of a fine, and declared the Uses to the Father in Fee, who made a feoffment to the Plaintiff and died, and the Question was, Whether the Estate of the feoffee should be charged with this Rent? Because it being granted by the Tenant for Life, tho' it was confirmed by the Remainder-man in Tail, 'tis void as to him, and therefore it was said that it must arise only out of the Estate for Life.

But it was held, That because the Tenant for Life had likewise a Remainder to the Estate both in Tail and in Fee, that this Rent issued out of all his Estates, and the Tail being barred by the fine, the feoffee must come in under all the Estates of the feoffor, who must hold it charged with the Rent.

So in this Case the Lease ariseth out of both the Estates of William Martin, and the Issue in Tail shall never avoid it by this fine.

Judicium.

Afterwards in Hillary Term, 4 & 5 Wilhelmi & Mariae, Judgment was given for the Defendant, and that the Cognizee of the fine could not avoid this Lease made by William Martin.

The Reasons were, because it was an Interest derived out of the Estate-tail, and it charged also the Reversion in Fee; for after the Determination of the first Lease made by Sir Nicholas Martin, his Son who had the Remainder in Tail might have suffered a Recovery and barred the Estate-tail.

Suppose this was not a void Lease, but voidable by the Issue in Tail, yet after the fine levied by him the Cognizee shall never avoid it, because he cannot be in Privity to the Estate-tail, for that is extinguished by the fine; and the Cognizor having thereby divested himself of that Power which he had to avoid this Lease, can never transfer it to the Cognizee.

Now it cannot be a Doubt, Whether the Estate-tail is extinguished or not: 'Tis true by the express Words of the Statute of 32 H. 8. 'tis barred; the Words are, That a Fine levied of Lands entailed on the Cognisor, or any of his Ancestors, shall be a Bar against the Person and his Ancestors, claiming by force of such Entail. And it hath been often held upon this Statute, that a fine levied by a Remainder-man in Tail, during the Estate of a Tenant for Life, was an Extinguishment of the Entail. 2 Leon. 37.

If it should be otherwise, then there would be two Fee-simples in one and the same Person. A qualified Fee determinable upon the Death of Tenant in Tail dying without Issue, and an absolute Fee out of the Reversion, which cannot be.

As to Acceptance or Refusal of Rent, 'tis not much material either to affirm or avoid this Lease; for unless the Issue in Tail doth enter, the Lease shall not be avoided. Dyer 51.

To prove this a Case in Dyer was cited, which was, Tenant in Tail before the Statute of Uses, made a feoffment in Fee to the Use of himself and his Heirs, then he and the feoffees join in a Lease for Years rendering Rent, then the Statute was made, and the Tenant in Tail died seised, afterwards the Issue in Tail levied a fine, and aliened the Land before he made any Entry upon the Lessee, or accepted the Rent, the Alienee did accept it; but whether he had done so or not, he could never avoid the Lease, because it was not void by the Death of the Tenant in Tail without the actual Entry of the Issue.

To maintain this Judgment, another Case was also cited, which was; Baron and feme Tenants in Tail, Remainder to the Husband in Fee; they had Issue A. the Husband died, the Issue in Tail in the Life-time of his Mother levied a fine to Sir Geo. Brown and his Heirs, the Mother made a Lease for Life, not warranted by the Statute of 32 H. 8. cap. 28. This was a Discontinuance, and therefore a Forfeiture, and Sir George might well enter thereupon; for the fine shall not operate by way of Conclusion, and the Mother be still Tenant in Tail; but the Estate-tail is barred and extinct as to the Issue in Tail. 3 Rep. 50.
Cro. Eliz.
513.
Idem Sir Geo.
Brown's Case.

And

And for these Reasons and upon these Authorities, William Martin the Tenant in Tail having also the Reversion in Fee, the Lease made by him issues out of both the Estates, and the Issue in Tail hath extinguished the Estate tail by levying of the Fine, so that the Cognizee must be in of the Reversion in Fee.

Sid. 260.

In the Argument of this Case at the Bench, Justice Dolben said, That the Case of Opie and Thomasius was neither well stated or well reported by Mr. Siderfin.

It was thus upon the Roll, Pasch. 15 Car. 2. Rot. 375. * A Man seised in Fee, made a Lease for 99 Years, if 3 Persons so long lived; then settled the Reversion upon himself in Tail, with Power to make Leases for 21 Years, and then he made such a Lease and died; the Son who was the Issue in Tail (and not the Father as 'tis reported there) levied a Fine and sold the Reversion; the first Lease determined upon the Death of three Lives: It seemed to the Court that the Cognizee might avoid this second Lease, because it was never in the Election of the Tenant in Tail or of his Issue to avoid it, they having conveyed away their Estates before this second Lease was to commence; for if Tenant in Tail makes a Lease to commence in presenti, and conveys away his Estate by Fine, the Cognizee must hold it charged with such Lease; but if it be to commence in futuro, 'tis otherwise, because it cannot be avoided before the Commencement.

But he said there was no Judgment given in that Case; there were only three Judges then in Court; Kelynge, who spoke nothing to the Point, and Twysden and Wyndham were divided in Opinion.

Chettle *versus* Lees.

THE Plaintiff obtained a Verdict, and the Judgment was entered with a Misericordia instead of a Capiatur, and now a Motion was made to arrest this Judgment, because it was an Error not amendable by the Statute of 8 H. 6. for that only helps the Dispersion of Clerks in Entries of the Judgments; but this is the Fault of the Court in giving Judgment; and therefore in an Assumpsit, where Judgment was against the Defendant, the Entry was, that the Plaintiff should recover 100 l. assessed by the Jury, and 5 l. pro misis per Jur' hic de incremento adjudicat', when it should have been per Curiam; this was held not amendable.

So in Debt against an Executor, Capiatur was entered instead of Misericordia, and it was held likewise not amendable.

8 H. 6. cap.
12.

Cro. Eliz.
497.
8 Rep. Black.
more's Case.
162. b.
More pla-
cito 501.

Econtra. On the other Side it was said, That in former Times the Courts were very strict in amending; but now since there are so many Statutes of Jeofailes, the Judges have thought fit to amend any thing that may help and support a Judgment fairly obtained, the Judgments being their own Judgments.

There have been Amendments allowed in many things more material than this, as in an Ejectment, the Judgment was, Quod querens recuperet dampna & custagia, instead of Quod recuperet terminum. 1 Roll. Abr. 206. Placit. 8.

So if Judgment be for the Defendant upon a Demurrer, and the Entry is that such a Day, prædict. quer. licet solempniter exactus non venit; which is the Entry of a Judgment upon a Non-suit, and not upon a Demurrer; yet this is amendable. Roll. Abr. 205. Placit. 4. 2 Cro. 632.

So where Judgment was against the Plaintiff, and there were several Defendants, the Entry was, that the Plaintiff, nil capiat per breve; and that the Defendants eant inde sine die, was wholly left out, but it was amended. 2. Saund. 289.

Now, an Amendment hath been eben in this very Point; where upon a Writ of Error upon a Judgment in Dower, the Record certified was, That the Defendant was in Misericordia, who being in that Case an Infant and appearing by Guardian, ought not to be amerced; and therefore it was amended, and made Et nihil in misericordia quia infans.

But per Curiam: This is now remedied by the Statute of 16 Cro. Car. and 17 Car. 2. cap. 8. which enacts, That Judgment shall not be stayed after Verdict for want of misericordia, or capiatur. 410. Hob. 127.

Cone *versus* Bowles.

Judgment was given in the Common Pleas for the Abowant, and Damages and Costs: The Plaintiff in Replevin brought a Writ of Error in this Court, and the Judgment was affirmed. 1 Salk. 205. 1. Shower 13 & 165.

And now a Motion was made that the Abowant might have Costs upon the Statute of 3 H. 7. cap. 19. which enacts, That the Plaintiff shall recover Costs and Damages where the Defendant brings a Writ of Error to delay Execution of the Judgment.

That the Avowant here is in the Nature of a Plaintiff, and hath a Judgment De return. habend. given, and is within the Reason of that Statute, because his Execution is delayed by such Writ of Error, as well as the Judgments obtained by Plaintiffs in other Actions, and so consequent-

V. 8 & 9
W. 3.

ly also is within the Equity of the Statute of 3 Jac. cap. 8. which appoints Bail to be given in a Writ of Error to prosecute it with Effect, and to pay all Costs and Damages to be awarded for delaying of Execution.
But the Court allowed no Costs.

Rex & Regina *versus* Fezas.

There was a Libel in the Spiritual Court, *Causa jactationis Maritagii*; pending that Suit the Woman exhibited an Indictment in this Court against all the Witnesses who might prove the Marriage, and it was for a Conspiracy by Force and Arms to carry her away against her Will, &c.

This Indictment was brought that the Parties might be convicted upon the Oath of the Woman, and so disabled to be Witnesses in the Ecclesiastical Court to prove the Marriage, which by this Means might be avoided.

And therefore Serj. Pemberton moved to stay Proceedings upon the Indictment until the Suit in the Spiritual Court was determined.

This was opposed by Serj. Tremaine and the King's Counsel, as not practicable to stay Proceedings in the King's Cause, for any Matter depending in a private Court, especially in this Case where the Indictment was for a Force in taking and carrying away of a Woman, and marrying her against her Consent, and so a thing collateral to the Suit in the other Court.

Neither was this Suit for Delay, for the Defendant had indicted two of the Witnesses against him for Perjury.

The Court would not stay the Proceedings upon the Indictment, but it was tried at the Bar, and the Woman being produced as a Witness, it was objected against her that she ought not to be allowed to give her Evidence, because there was a Marriage proved in the Spiritual Court; and where the Consequence of the Evidence will redound to the Benefit of the Witness he is always rejected.

Curia, Brown was executed for stealing Mrs. Ramsey, and she was allowed to be a Witness in that Case.

Cro. Car.

And in Fulwood's Case upon the Statute of H. 7. the Woman was allowed to be a Witness; and so she was in this Case.

Cudlip *versus* Rundall.

Trin. 2 Willielmi, Rot. 646.

In an Action upon the Case the Plaintiff declared, That ^{1 Show. 310.} on the 20th Day of May, 36 Car. 2. he was possessed of a Term for Years in an House, and that the same Day he let it to the Defendant for seven Years by Indenture, by Vertue whereof he entred, and afterwards so negligently kept ^{mod. 181.} his Fire that his House was burned.

The Defendant pleaded, Non dimisit per indenturam prædictam modo & forma prout, &c. Upon this they were at Issue, and the Jury found a Special Verdict; the Substance whereof was,

That the Plaintiff was possessed of the House, and that by Indenture bearing Date the 25 May, made between him of the one Part, and the Defendant of the other Part, he did demise the Tenement to the Defendant and his Assigns for seven Years: Except and always reserved out of the said Demise and Lease to the Plaintiff, his Executors and Administrators, the House, commonly called, The new House, for the Use of the Plaintiff and his Father, and of his and their Family, if he or they please to dwell therein; but not to be let to any other Person; and at all other Times when they do not live there, then to the Use of the Defendant and his Assigns.

They find that there was a new House and an old House, and that a fire happened in a Room of the new House, then in the Possession of the Defendant, and burnt it down; and if this was a Demise modo & forma, then they find for the Plaintiff; if not, then for the Defendant.

Serj. Tremaine made two Points upon this Case:

(1.) The first was upon the Declaration it self, Whether such an Action would lie by the Lessee for Years against his Under-Lessee? And he held that it would, because the Plaintiff himself is chargeable to his Lessor by Reason of consequential Damages: 'Tis like the Case of a Master who may maintain an Action for the beating of his Servant.

'Tis true, the Countess of Shrewsbury brought the like Action ^{5 Rep. 13. b.} against Tenant at Will; and the Judgment was, Quod querens nil capiat per billam: But the Reason of that Judgment was, be-

C

cause

cause at the Common Law there was no Remedy against Lessee for Life, or Lessee for Years, for voluntary or permissive Waste; for they having an Interest in the Land by the Act of the Lessor, it was accounted his folly to grant such Estates, and not restrain the Parties by Covenants from doing any Waste.

(2.) The second Point was, Whether upon this Issue. Non dimisit modo & forma, there is not a Variance between the Demise and the finding by the Jury? And he held it was not.

Co. Lit.
281. b.

2 Cro. 329.

For the Plaintiff declared, That he was possessed of a House, and that he let it, &c. which the Defendant denied modo & forma; and the Jury find, that he did let the House except the new House: Now the Words modo & forma are of course here, and no Part of the Issue, 'tis still a Demise of the House, and the legal Interest is in the Lessee, the other had only a Privilege to live in Part of it; and if denied, he had no Remedy but by Action of Covenant, for it will not create such an Interest as will maintain an Ejectment.

Cro. Eliz. 40.
Owen 91.
idem.

If a Jury find more than they ought, yet Judgment shall be given for the Plaintiff: There are many Authorities to this Purpose; as in Waste against the Defendant who made a Feoffment to the Use of himself for Life, Remainder to the Plaintiff and his Heirs; the Defendant pleaded that he was seised in Fee, and traversed the making the Feoffment; and the Jury found that he made a Feoffment to the Use of himself for Life without Impeachment of Waste; yet the Plaintiff had Judgment, because the Jury had found such an Estate as was alledged by him, and tho' they had also found that it was dispunishable of Waste, it being more than what was in Issue, yet the Defendant having taken no Advantage of it in Pleading, the Plaintiff did recover.

But this Case depends upon the Construction of the Words in the Exception, in which, if the subsequent Words qualify those which go before, then an Interest passes to the Defendant.

3 Bull. 68.
Owen. 64.
1 Cro. 208.

Now the Exception as it stands by its self, seems to be against the Plaintiff, but the subsequent Words make the Sentence plain, that a Liberty only is reserved for the Plaintiff to use the new House.

There are several Cases which prove that precedent Clauses may be qualified by Words which come after in the same Sentence, as a Demise of the Demesnes of his Manor, in which the Lessor also granted the keeping of the Park: it was held that the Soil of the Park did not pass, tho' the first Words did carry the

the whole Estate: but the subsequent Words shew in what Manner he shall have it.

Another Reason urged for the Plaintiff was, That this Exception is void, because it is contrary to the Demise; and to prove this, a Case was cited out of Dyer, which was, Baron and Feme had a Lease of a House in Fleetstreet: The Husband made an Under-Lease for Part of the Term, excepting the Shops for his own proper Use: The Husband dies, the Wife entred and was ousted, and brought an Ejectment for the Whole. My Ld. Dyer was of Opinion, that the Shops being leased generally, and the Exception being only restrained to the Use of the Husband without saying his Executors or Assigns, that it was contrary to the Premises, and so the Exception was void, which he tells us was the Opinion of other Justices, tandem.

Dyer. 264.
Benl. 181.

Moor 880.
Lanc. 69.

'Tis true the same Case is reported in Benloe, but that Report cannot be true, because it refers to my Ld. Dyer, where 'tis otherwise. 'Tis likewise reported by my Ld. Anderson that the Exception was absolute; but this seems to be upon the first Argument of that Case, for my Ld. Dyer is express that tandem the Judges were of another Opinion.

1 And. 52.

Roe and others, contra.

As to the first Point it was argued, that this Action would not lie by a Lessee for Years against his Under-Lessee, for this Exception made him only Tenant at Will in the New House, which was never demised to the Defendant, but totally excepted by express Words.

Econtra:
ex parte. def.
2Saund. 206.
Sid. 405.
Owen 20.
Cro. Eliz.
237.

'Tis an Exception which doth not go to the whole Term demised, but 'tis restrained to the time when the Plaintiff shall reside there; it imports no more than an Agreement when one doth not use the House the other shall, and therefore no Interest doth pass: If so, it cannot be a Demise for 7 Years modo & forma, 'tis only a Lease at Will: And for an Authority in point, the Case of Hornby and Clifton was cited, which was this: Hornby made a Lease of a House to Clifton, except and always reserved two Chambers, &c. pro suo proprio usu & occupatione. Hornby died, his Wife married again, and the Husband entred into the Chambers excepted, and being turned out, he and his Wife brought an Ejectment, and upon Not guilty pleaded they had Judgment, because the Exception was absolute, and the Words pro suo proprio usu were held to be vain and immaterial.

1 And. 52.

It was agreed that where an Exception is repugnant to the Premises the Grant is void, but 'tis not so here.

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That

That the End of an Exception is to take something out of the Grant which would otherwise have passed, and 'tis always of such Things which are in Being at the Time of the making of the Grant.

Here 'tis Except and always reserved, &c. Now this Word always is of as great Signification as if the whole Term had been reserved.

But it must be taken either as a Description of the Thing excepted, or a Declaration for what Purpose it was excepted.

It cannot be taken in the first Sense, and therefore it must be construed as a Declaration to what Use it was excepted, and that is by the express Words to the Plaintiff and his Assigns.

Besides, this House was not to be let to any other Person whatsoever, which Words would be idle if the Plaintiff had only a personal Use to himself.

Judicium.

The Court making some Doubt upon the first Argument, whether this was a Tenancy at Will by the subsequent Words, one of the Justices being of Opinion that the Defendant could not be Tenant at Will, because the Plaintiff must have been non-suited, if he had not proved a Demise for seven Years; therefore Time was taken to consider of it, and afterwards in Hillary Term, 4 Will. Judgment was given that the Defendant was Tenant at Will, and no more, that this could not be a Lease for seven Years, because it was at the Pleasure of the Lessor, when and how long the Defendant should enjoy it; and therefore it was held that the New House was absolutely excepted out of the Demise, and it was such an Exception, which was not qualified by the subsequent Words, being fully excepted before.

Then as to the Action it was held that he who hath the Inheritance cannot have an Action against Tenant at Will, but the Lessee for Years may: That in this Case the Estate is not the Question but consequential Damages; that the finding of the Jury was out of the Issue: For if Trespass is brought, and the Defendant should plead Son Franktenement, and the Jury find him Tenant in Common with another, there is a good Cause of Action found, but 'tis out of the Issue, and will not maintain the Declaration. Judgment was given for the Defendant.

Baugh

Baugh *versus* Killingworth.

The Plaintiff was indebted to the Defendant for the Rent of a House and Lands in the Country, and coming to London was arrested by the Defendant by Virtue of a Plaint levied in the Sheriffs Court of London; for which he brought an Action on the Case, and decl. red, Quare cum, (the Defendant) machinans & fraudulenter intendens eundem (the Plaintiff) magnopere pręgravare, & minus iuste opprimere 15 Aprilis Anno x. iniuste & malitiose apud London, &c. eundem (the Plaintiff) prętextu & colore cujusdam prętenſe querele in Cur' Dni' Regis & Reginae ad tunc tent' coram Johanne Fleet Mil' tunc un' vic. Civit' London in Computatorio suo ſcituat' in paroch' & warda præd. intrat. & levat' ad ſectam (the Defendant) super quand. pretenſ. Action. ad magnum prætenſum damnum ipsius (the Defendant) arrestari & imprisonari cauſavit & procuravit ac præd' (the Plaintiff) in prisoſa & cuſtod' ibid. ratione arrestation' præd' per magnum tempus ſcil. per ſpaciũ ſex dierum detent' fuit pro defectu ſufficien' manuſcaptor. & ſecuritat. ad pretenſ. Action. præd. pro præd. pretenſ. dampno ubi revera & in fact'o præd. (the Defendant) tempore arrestation' & imprisonamenti ipsius (the Plaintiff) ut præfertur vel ad aliquod tempus antea nullam habuit cauſam actionis verſus præfat' (the Plaintiff) infra Jurisdiction' ejusdem Curia: ratione quorum quidem iniuste & malitiose arrestacon' & imprisonamenti ipsius (the Plaintiff) præd' idem (the Plaintiff) non ſolum in prisoſa & cuſtodia per totum tempus præd. detent. & de libertate ſua deprivatus fuit super prætenſ. Action. præd. pro damnis præd. verumetiam magnos labores & expenſ. pro relaxation' ſua ab arrestation. & imprisonament' præd. erogavit ac ſubire & erogare compulſus fuit unde dic. quod deteriorat' eſt & dampnum habet ad valentiam quingentar. librarum & inde produc. ſectam &c.

Upon Iſſue joined they went to a Trial, and the Plaintiff had a Verdict; and now Serj. Tremaine moved in Arrest of Judgment, That there was no Reason (as he alledged) to ground an Action on the Case; for tho' the Sheriff's Court had not an original Jurisdiction of the Cause, it being for Rent due for a House and Lands in the Country, yet when the Plaintiff was in the City, that Court had a Jurisdiction over his Person.

Besides,

Besides, he might have pleaded to the Jurisdiction in that Action, which was brought against him in the Compter, which he had not done, neither did he alledge in this Declaration that he was held to unreasonable Bail; for if that had been so, there might have been some Colour for this Action, but upon the Pleadings there is none.

If a Suit should be commenced, for which there is but a probable Cause of Action, yet the Defendant in such Action shall not be entitled to another Suit against the Plaintiff.

1 Roll. Abr.
102.
2 Cro. 133.

So if there be Judgment against the Defendant for a Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releases the Defendant, and afterwards takes him in Execution within the Year, yet he shall not have an Action for this Exaction, but must bring an Audita querela.

So likewise if he take him in Execution after the Year, 'tis erroneous, but an Action will not lie, he must bring a Writ of Error.

And for these Reasons the Judgment was stayed.

Hodge *versus* Clare.

Scire fac. was brought by John Hodge as Administrator to Alexander Hodge, during the Absence of Hannah Hodge, upon a Judgment recovered in this Court, upon which there was a Writ of Error brought in the Exchequer-Chamber, and the Judgment affirmed.

1 Salk. 42. S. P.

The Defendant demurred to the Scire fac. and for Cause shewed,

1. It doth not appear that any Judgment was given in the Exchequer-Chamber (upon which this Scire fac. is now brought) to have Execution; for the Words adjudicat. fuer. were left out.

2. 'Tis not averred that Hannah was absent at the Time of the Administration committed to John Hodge, and so continued.

This Objection was answered by the Court that the Party ought to plead it.

3. That the Administration was void, because of the Incertainty; for having prayed Oyer of the Administration, which being read in hæc verba, it appeared to be granted durante absentia, &c. and doth not say from what Place the Person was absent.

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This

This was also answered by the Court, That it shall be intended out of the Kingdom.

4. That it must be void, because the Ordinary hath no Power to grant Administration by the Common Law; the Authority which he hath is given to him by particular Statutes.

By the Statute of W. 2. he hath Power to dispose the Estates of Persons dying intestate. 13 Ed. i.
cap. 19.

By the Statute of 13 E. 3. cap. 11. he hath Power to appoint Administrators; and by the Statute of 21 H. 3. cap. 5. that Power of granting Administration, which before was too general, but now restrained to the Wife or next of Kin.

Now if the Ordinary doth exceed the Authority given to him by these Statutes, then this Court will prohibit him.

But such an Administration as this is not warranted by any of these Laws, because 'tis directed to whom the Administration of Intestates Estates shall go; but 'tis not appointed by any of these Statutes, that it shall be granted to any one during the Absence of another, and therefore the Grant of this Administration must be void.

It would be very inconvenient if it should be otherwise in respect of Debtors and Creditors, because this Administration is determinable upon the returning of Hannah Hodge into England, of which all Debtors must take Notice at their Peril; and it would be also very hard upon the Creditors, who having commenced their Actions against such Administrators must then begin again.

But these Objections were not allowed, for all of them may be made as well against an Administrator Durante minore ætate, which is very like this Case; and yet such an Administration is held good, because 'tis in a manner granted to the right Person, who has thereby good Authority to receive the Estate.

D E

Termino Paschæ,

Anno 3 Gulielmi & Mariæ in B. R. 1691.

Jones *versus* Beau.

1 Show. 288.

A *Q* Indebitatus Assumpsit was brought for the Profits of the Office of the Chancelloꝝ to the Bishop of Landaff.

The Defendant pleaded Non assumpsit, and this being an Issue directed out of Chancery, was tried at the Bar.

The Bill was exhibited in that Court by the now Defendant for the Books belonging to the Office, and to quiet him in the Possession thereof.

At the Trial in this Court, the Defendant by Order of the Court of Chancery was to admit of the Receipt of the Profits of the Office to the Value of 5 l. and was also to admit the Copy of the Patent under which the Plaintiff at Law did claim. and the Confirmation of the Dean and Chapter.

The Patent was made in the Year 1672. by Francis David then Bishop of Landaff, by which this Office was granted by him to D^r. Lloyd, and the Plaintiff Jones, and to the Surbiboꝝ, and that D^r. Lloyd was dead.

So that the Point now tried was, Whether it had been an Usage in this Diocess to grant this Office to two, and it must be such an Usage as was before the making the Statute of 1 Eliz. otherwise it will not warrant such a Grant.

The Plaintiff produced four Grants of this Office to two Persons, of which three were made in the Time of one Bishop, and the last was made in the Year 1620, and no Grant thereof afterwards to two, until this to D^r. Lloyd and the Plaintiff Jones.

Whereupon the Counsel for the Defendant insisted, That if the Plaintiff had any Title it was gone by Non-User, for the Chancellor, being a Judicial Officer, the Non-User is a Forfeiture of the Office, it being for the Administration of Justice.

The Bishop being in Court, offered to be sworn to give Evidence concerning the Usage in his Diocess, and that he had granted this Office to one, &c.

But this was not allowed; for if the Plaintiff hath a good Title, then the Grant made by the Bishop is void: And it was compared to a Patron in an Ejectment, who is never permitted to be a Witness to maintain the Title of his Clerk.

Then it was objected, That since the Plaintiff had produced no Grant to two Persons, but what was fifty Years after the 1 Eliz. that it would be a very difficult Matter to persuade the Jury to take it upon their Oaths, that the Office was granted so before the making of the Statute.

But Serj. Pemberton answered, That these Grants were only produced as Evidence that such were made, there being no Records extant relating to this Matter before that Time.

And Justice Dolben remembred Ridley's Case, concerning the Office of Register of Bristol, wherein my Ld. Hale was of Opinion, That if it could be shewn that such Grants were made some Time after 1 Eliz. it would be an Evidence that such were also made before the Statute.

The Jury found the Matter specially, and the Point upon the Special Verdict was, Whether the Office of a Chancellor, which hath been usually granted to two ever since the Statute of 1 Eliz. can be granted by Law?

In the Argument of this Case it was admitted: That Offices Ministerial may be granted to two, and so may also some Judicial Offices, which are established by Act of Parliament; but if such Offices are of Antiquity, then a Grant made to two is void; and therefore if the Office of Prothonotary of the Common Pleas, or those of Chief Justice of either Court are granted to two, the Patents are void, because they may differ in Judgment, which would be a Delay to Justice; so here this Grant may be of publick Injury; for if it be allowed to be good to two, then one may absolve, and the other may excommunicate.

2. This Grant is void upon the Statute of 1 Eliz. which enacts, That all lawful Grants made by Ecclesiastical Persons of any Office in OLD TIME WONT to be granted, shall be good.

4 Inst. 146.
18 E. 4. 7. b.
Cro. Car.
258.
Jones 263.
Winch. Ent.
22.

Now this cannot be a good Grant, if the Office hath not been usually granted to two in old Time, which was not found by the Verdict, for there was no Evidence to that Purpose.

Ex parte
Quer.
11 Rep. Au-
ditor *Curle's*
Case.

Econtra. It was argued, That the Grant of this Office was good; 'tis like the Grant to two Sheriffs, or of the Auditor's Place of the Court of Wards, when that Court was in being, which was partly a Judicial Office.

'Tis not void at the Common Law, and if so, the Statute of 1 Eliz. makes no Alteration as to this Case; for that restrains Bishops from making Grants of Lands, Tenements, and Hereditaments, being part of the Possessions of their Bishopricks, other than for twenty-one Years or three Lives, from the Time of such Grant, which hath been usually demised, and whereupon the old accustomed Rent, or more, shall be reserved.

But a Grant of an ancient Office in such manner as it hath been accustomed to be granted is out of that Statute, the Makers whereof did chiefly regard the Revenue of the Successor, that he might have sufficient to maintain Hospitality, and to repair the Dilapidations of the Church, if any such should be, which might not be done, if the Acts of his Predecessor should bind him.

Bridg. 29.
Cro. Car. 47.
10 Rep. 58.

But this is an ancient Office, and being grantable to two, it cannot be a Diminution of the Revenue of the Successor, and therefore it must be exempted out of the Statute.

Curia. Nothing can support this Grant but Usage, and there being enough found to induce the Court to be of Opinion. That this Office was anciently granted to two before the Statute; therefore they held this Grant good; and Judgment was given for the Plaintiff.

Afterwards the Defendant Beau libelled against Dr. Jones in the Spiritual Court for his Ignorance in the Canon and Civil Laws, the Knowledge whereof (as he suggested) was required in a Chancellor; whereupon Dr. Jones brought a Prohibition as followeth.

D E

Termino Pasch.

Anno 3 Gulielmi & Mariæ Rot. 444.
in Banco Regis & Reginae.

*Action
for suing
after a
Prohibi-
tion.*

Gulielmus Episcopus Landav. sum. fuit ad respondend. Johan. Jones legum Doctori Vicar. in spiritualib' general. & Cur' consistor' Episcopali' Dio- ces. Landav. official. principal' qui tam pro Dno. Rege & Dna. Regina quam pro seipso sequitur de placito quare secut. est placitum in Cur. Christiani- tatis contra prohibition. dict' Dni' Reg. & Dne. Reginae ei prius inde in contrarium dire- ct. & deliberat. & unde idem Johan. Jones qui tam &c. per Josuam Morris Attorn' suum queritur quod cum officium Vicar. in spiritual' general. five Cancellar. principal. of- ficial' Episc. Landven. pd. est antiquum officium ac a tem- pore cujus contrar. memoria hominum non existit quando- cunq; officium illud acciderit vacuum esse predict. Officium concess' & concessibile fuit & dari & concedi consuevit per Episcopum Landaven' pro tem-

pore existen' alicui personæ idone. pro termino vitæ suæ seu aliquibus duabus perso- nis idoneis conjunctim & di- visim pro termino vitarum suarum & vitæ alterius diuti- us viventis ac secundum hu- jusmodi concessionem habit. & gravif. fuit juxta formam & effectum hujusmodi concessi- on. cumque officium prædict' fuit vacuum ac superinde Fran- ciscus nuper Episcopus Landav- en' 7 die Septembris Anno Dni. 1671. apud London præ- dict. videlicet in paroch. beatæ Mariæ de Arrubus in warda de Cheape per quasdam literas suas patentes sigillo suo Episc' sigillat. per eundem Johannem qui tam &c. hic in Curia pro- lat. geren. dat. eisdem die & Anno pro diversis bonis & legi- timis causis & considerationib. ad animam suam in ea parte specialiter moven' dedisset con- cessisset & confirmasset pro se- ipso & successoribus suis Episc- opis Landaven. dilecto sibi in

*Grant-
ble to
two Per-
sons for
life.*

*Grant of
the Office.*

*The Of-
fice of
Vicar Ge-
neral, or
Chancel-
lor.*

D 2

Christo

Christo Richardo Lloyd legum Doctori un' advocator. almae Curiae Cantuar. de Arcub' London & praed. Johanni Jones qui tam &c. per nomen Johannis Jones artium magistri & Collegii Jesus Oxon. socii & eorum utrique conjunctim & divisim & eorum alteri diutius viventi (ipsis Richardo Lloyd & Johan. Jones personis idoneis ad officium illud habend' existen.) praedictum officium vicar. in spiritualibus general' & official. principal. in & per totam Civitat. Dioces. & jurisdiction. Landaven. praed' & praesiden. Curiae Episcopalis. Landaven. praed. ubilibet infra Dioces. praed. constitut. sive constituend. eosq; & eorum utrumque conjunctim & divisim Vicar. in spiritualibus general' & Cur. Consistorial. Episcopalis. Landaven. praed' official' principal' constitut. praefecit habend. exercend. tenend. & gaudend. praed' officium & officia ac etiam omnia & singula praemissa cum suis pertinen. quibuscunq; praefat. Richardo Lloyd & Johanni Jones qui tam &c. conjunctim & eorum utriq; per se divisim & eorum diutius viven. per se aut deputat. aut surrogat. suos sufficientes quoscunque sine impedition. impedimento aut molestia sua vel alicujus successorum suorum Episcoporum. Landav. praedict. una cum omnibus & singulis feodis vadiis profic. commoditatib. emolumentis & ho-

norariis quibuscunq; ad officium praed. spectan. & pertinen. ac ratione & intuitu praemissorum vel eorum aliquorum de jure consuetudine vel alio quoquo modo debit. & solvi consuet. a tempore confectio. literarum paten. praed. pro & duran. termino & terminis vitarum naturalium eorundem Richardi Lloyd & Johannis Jones & eorum utriusq; diutius viven. quam quidem concessio praefat. Richardo Lloyd & Johanni Jones qui tam &c. in forma praed. fact' & omnia & singula in eadem content. postea scil' primo die Martii An. Dni. 1671. supradict' per Decanum & Capitulum Landaven. apud London. praedict. in parochia & warda praedict. per quoddam scriptum suum confirmationis sigillo suo Capitulum sigillat. quod idem Johannes qui tam &c. hic in Curia profert geren. dat. est eisdem die & Anno in vita praefat. Francisc. tunc Landaven. Episc' praed. existen. ac in vita praefat. Richardi Lloyd modo defunct. ratificaverunt & confirmaver. virtute quarum quidem literarum paten. ac confirmation. inde sit ut praefertur. fact. praedict. Richardus Lloyd & Johannes Jones qui tam &c. fuer. de officio praedicto cum totis feodis proficuis perquisit. & pertinen. adinde spectan. seifit. ut de libero tenemento pro termino vitarum suarum & vitae eorum alterius diutius

Confirmed by the Dean and Chapter.

Habendum.

*One of
the Gran-
tees died.*

*The o-
ther sole
seized.*

diutius viventis & sic inde sei-
sit. existen. idem Richardus
Lloyd postea scilicet decimo
die Decembris Anno Domini
1686. apud London præd' in
paroch. & warda præd' obiit
de tali statu inde seisit. & præd.
Johan. Jones ipsum supervix.
post cujus mort. idem Johan'
Jones qui tam &c. fuit de of-
ficio præd' solus seisit. ut de li-
bero tenemento per jus accref-
cendi &c. ac sic officium illud
cum omnibus feodis proficu-
is & pertinen. adinde spectan'
gaudere & habere debuit &
debet virtute concession. &
confirmation præd' Cumque
omnia & singula placita &
negotia tangen. & concernen'
liberum tenement' ac jus & ti-
tulum aliquarum terrarum of-
ficiorum & hæreditament. ac
validitat. interpret. vigorem
vel effectum aliquorum dono-
rum concession. sive confirma-
tion' infra hoc Regnum An-
glia fact' ac etiam interpreta-
tion. Chartarum & concession.
ad Dominum Regem & Do-
minam Reginam nunc & co-
ronam suam Regiam & non
ad Curiam Christianitatis ullo
modo spectant & pertinent ac
per leges terræ hujus Regni
Anglia in Curia Domini Re-
gis & Dominæ Reginæ de re-
cord' coram ipsis Rege & Re-
gina vel Justitiariis suis Cu-
riarum illarum ac judicibus
secular. & temporal. & non
in Curia Christianitat. nec
per jur' sive censuras Ec-
clesiastic' ullo modo triari

terminari & discuti debeant &
semper hætenus consuever &
debuer. præd' tamen Guliel-
mus modo Landaven. Episc.
præmissorum non ignarus &
leges hujus Regni Angliæ mi-
nime ponderans ac illas vio-
lare proponens & machinans
præd. Johannem Jones qui tam
&c. contra leges & statuta
hujus Regni Angliæ indebite
prægravare opprimere & fati-
gare necnon jus statum titul.
& interesse ipsius Johannis
Jones qui tam, &c. in & ad
officium præd' evacuare & vim
validitatem concession & con-
firmation' officii præd' in for-
ma prædicta fact' per callidas
assertiones & allegationes in
hac parte fact' in Curia Chri-
stianitat' triari & terminari
eundemque Johannem Jones
qui tam &c. ab executione
officii præd' ac feodis & profi-
cuis officio prædict. spectan' &
pertinen' hend' & percipiend'
amoveri deprivari & excludi
causare necnon dictum Domi-
num Regem & Dominam Re-
ginam nunc & coronam
suam Regiam exhæreditare
cognitionemque placiti quæ
ad ipsos Dominum Regem
& Dominam Reginam nunc
in hac parte & Coronam
suam Regiam & non ad Cu-
riam Christianitat. ullo mo-
do spectat & pertinet ad
aliud examen in curia Chri-
stianitat. trahere ipsum Jo-
hannem Jones qui tam &c.
in Curia Christianitat. co-
ram Georgio Oxenden le-
gum

Traxit in
placitum.

And ex-
hibited
Articles
in hęc
Verba.

gum doctore alme Curie Cantuar. de Arcubus London. official. principal' legitime constitut. scil. apud London. præd' in paroch. & warda præd' tent. post concession' & confirmation. in forma pd' fact. de super & concernen. validitate ejusd' concession. & confirmat' ac præd' jus statum & titulum ipsius Johannis Jones qui tam &c. de & in officio præd. traxit in placitum ac versus ipsum Johannem Jones qui tam &c. ibidem diversos articulos exhiberi & objeci causavit quorum quidem articulorum tenor sequitur in hæc verba scilicet Imprimis Objicimus & articulamus, Against you the said Dr. John Jones, That whereas you do execute the Office of Chancelloz, and do exercise Ecclesiastical Jurisdiction, by Virtue thereof within our Diocese of Landaff, and whereas the Laws Ecclesiastical of this Realm positively require and direct, that Nullus ad officium Cancellar. commissio- nar. aut official' admittetur ad jurisdiction. quamlibet exer- cend. nisi qui in jure Civili & canonico eruditus existat sitque in praxi & causis foren- sibus laudabiliter exercitatus, You the said Dr. John Jones do exercise the Office of Chancelloz and Principal Of- ficial and Ecclesiastical Ju- risdiction in our Diocess of Landaff, and are not in jure Civili & canonico eruditus nec

in praxi & causis forinsecis lau- dabiliter exercitatus, nor have applied your self to the Study and Practice of the Civil and Canon Laws, as required by the said Ecclesiastical Laws; but have wholly ap- plied your self for near twenty Years last past, and do still to the Study, Practice, and Exercise of Physick, where- by great Prejudice and De- triment may and doth arise to the Publick, Et objicimus & articulamus ut supra. Item objicimus & articulamus a- gainst you the said Dr. John Jones, That you appointed De- puties not skilled in Civil or Canon Law. 3. That he was absent for the most part from Landaff, where the Consistory- Court ought to be kept, and did not provide a Surrogate to be resident there. 4. That he left his Chancelloz's Seal with one Philip Maddox the Register, and sometimes with his Wife; whereas it ought to be kept by himself or Deputy. 5. That he absolved William Cornish and his Wife, from a Sentence of Excommunica- tion for a Clandestine Mar- riage, and had taken Money by way of Commutation of Penance. 6. The Ecclesiasti- cal Laws require, That a Mi- nister who marieth Persons clandestinely, shall be suspend- ed ab officio & beneficio for 3 Years, and a Person so de- creed suspended you in a few Weeks

Wicks after absolbed. 7. tozs and Proctoꝝ. 17.
 For menacing the Bishop's Apparatoꝝ in serving a
 Summons. 8. For declaring the Bishop's Ser-
 vant Excommunicate for serving a Monition un-
 der the Episcopal Seal. 9. For absolbing one whom
 the Bishop had excommunicated. 10. That he
 refused an Apparatoꝝ appointed by the Bishop to
 exercise his Office by a Deputy, and appointed ano-
 ther in his Room. 11. For reserving and prohibiting
 the Register to send the Book of Acts and Entries,
 that the Bishop might inspect the Irregularities in
 some Proceedings in the Consistory-Court. 12. For
 issuing out publick Instruments in his own Name;
 Johannes Jones Legum Doctor Reverendi in Christo Patris
 Gulielmi permissione divina Landaven Episc. Vicarius in
 spiritualibus generalis & official. principalis legitime consti-
 tut. universis & singulis Clericis & literatis in & per totam
 nostram Landaven. Dioces. &c. 13. That licensing of Cu-
 rates and Apparatoꝝ was excepted out of his Patent,
 yet he hath exercised Jurisdiction contrary to the
 Patent. 14. By licensing Proctoꝝ and Apparatoꝝ,
 &c. 15. Who have acted after Monition given to you.
 16. That he hath displaced Persons appointed by the
 Bishop to act as Appara-
 toꝝ and Proctoꝝ. 17. That he cited all School-
 masters and Curates who acted without Licence to
 appear before him, and to take Licences, notwith-
 standing the restraining Clause in his Patent,
 whereby that Power is reserved to the Bishop.
 18. That he granted a Licence for Evan Rees to mar-
 ry Mary Tanten, being under the Age of 12 Years,
 and an Heiress, without the Consent of her Tutor
 or Guardian. 19. That he granted Administrati-
 on to one, and afterwards without revoking it, grant-
 ing a Probate of a nuncupative Will of the same
 Person to another as Executor. 20. That he grant-
 ed Licenses to Schoolmasters contrary to his
 Patent. 21. Item quod dictus Johannes Jones Legum
 Doctor fuit & est Dioces. Landaven. Cantuar. Provincie
 eoq; intuitu ac ratione hujus litis jurisdiction. hujus
 Curiae notorie subditus & subjectus & ponit ut supra.
 Item quod de & super praemissis, &c. Item objicimus
 & articulamus quod praemissa omnia & singula sunt vera dic-
 tumq; doctorem Johannem Jones propter temeritatis suae
 excessum in praemissis necnon propter insufficientiam & igno-
 rantiam suam antedict. canonice puniend. ac ab officio suo praedicto amovend. fore & debe-
 re pronunciamus, &c. Guliel-
 mus

mus Landaven. prout per eosdem articulos in prædicta Curia Christianitatis coram præfat. Georgio Oxenden residenti. & veram copiam inde in Curia hic prolat. plenius liquet & apparet præd. Gulielmus Landaven. Episc. eundem Johannem Jones qui tam, &c. in præd. Cur. Christianitat. coram prædict. Georgio Oxenden occasione articulorum præd. comparere minus juste astringit ac eundem Johannem Jones qui tam, &c. de & in præmissis condemnari ac de & ab officio præd. per definitivam dict. Cur. Christianitatis. sententiam deprivari totis suis viribus conatur & indies machinatur ac licet breve dictorum Dni. Regis & Dominae Reginae de prohibitione præfat. Georgio Oxenden & al. iudicibus in hac parte competentes. vicesimo die Novembris anno Regni dictor. Dni Regis & Dominae Reginae nunc quinto apud London. præd. in parochia & warda præd. in contrarium inde direct. & deliberat. fuit idem tamen Gulielmus Episcopus Landaven. placitum prædict. post prohibitionem Regiam prius in contrarium inde in forma præd. direct. & deliberat. scilicet vicesimo primo die Novembris anno Regni dictor. Dni Regis & Dominae Reginae nunc quinto supradict. apud London. prædict. in paroch. & warda prædict. ulterius prosecutus fuit & in placito illo processit (dicto brevi dict. Dni. Regis & Dnæ. Reginae de prohibitione præfat. Iudicibus in spiritualibus prius in contrarium inde in forma prædicta direct. & deliberat. non obstante) in dict. Dni. Regis & Dominae Reginae nunc contemptum & ipsius Johannis Jones qui tam, &c. dampnum prejudicium depauperation. & gravamen manifestum ac contra leges hujus Regni Angliæ unde idem Johannes Jones qui tam, &c. dicit quod ipse deterioratus est & damnum habet ad valentiam centum librarum & inde producit. sectam. &c.

Et præd. Gulielmus Landaven. Episc. per Bezaleel Knight Attorn. suum venit & defendit vim & injur. quando, &c. & omnem contemptum & quicquid, &c. & dicit quod ipse non secutus fuit placitum præd. versus præd. Johannem Jones in Cur. Christianitat. contra prohibitionem dictorum Dni. Regis & Dominae Reginae prout idem Johannes Jones qui tam, &c. superius supposuit & de hoc ponit se super patriam & præd. Johannes Jones qui tam, &c. similiter, &c. sed pro brevi Dni. Regis & Dnæ. Reginae de Consultatione quoad placitum præd. super primum articulum in narratione prædict. mentionat. & quoad materiam in eodem content. habend. idem Gulielmus Episc. Landaven. dicit quod narratio

The Defendant pleads, That he did not prosecute after the Prohibition and Issue thereupon.

Sed pro Consultatione habend. he demurs.

narratio præd. quoad præd. primum articulum & materiam in in eodem primo articulo content. minus sufficiens in lege existit ad ipsum Gulielmum Landav. Episc. ad inde respondere compellend. ad quam idem Episc. necesse non habet nec per legem terræ aliquo modo tenetur respondere unde pro defectu sufficiens narration. in ea parte idem Episc. petit iudicium de narration. præd. quoad præd. primum articulum ac quod breve dictorum Dni. Regis & Domine Regine de Consultatione in ea parte quoad eundem primum articulum concedatur, &c. Et pro brevi de Consultatione quoad resid. articulos præd. in narratione prædict. mentionat. habend. idem Episcopus ulterius dicit quod per & secund. Canones & Leges Ecclesiasticas in Regno Angliæ usitat. & approbat omnia & singula offensæ criminalis & materiæ in eisdem articulis mentionat sub periculo quarundum Ecclesiasticarum Censur' prohibet' sunt & diversis Ecclesiasticis censuris punibil. existunt necnon per easdem leges coram Ecclesiasticis iudicibus in ea parte competentibus & non alibi triari examinari & puniri solent & debent quodq; in vel per eisdem resid' articulo vel prosecution' eorundem vel alicujus eorum in Curia Christianitatis jus sive titulus ad vel in officio præd.

in narratione præd. mentionat' triari examinari vel in questione redigi minime possit Itemq; Episcopus ulterius dicit quod ipse idem Episcopus eundem Johannem Jones in Curia Christianitat. præd. videlicet apud London. præd. in parochia & warda præd. prosecutus fuit super eisdem resid. articulos supradictos in ordine ad canonicam punitionem & Ecclesiasticas Censuras in ea parte debitas & minime per deprivation. seu exclusion. ab officio prædicto pro causis in eisdem articulis residuis super eundem Johannem Jones infligend. & adhibend. Et hoc idem Episcopus paratus est verificare unde petit iudicium & breve dictorum Dni. Regis & Dnæ. Regine de Consultatione quoad præd. residuum articulos sibi in hac parti concedi.

Barth. Shower.

Et præd. Johannes qui tam, *Replia-
tion.* &c. dic. quod per aliqua per prædictum Gulielmum Episcopum Landaven. superius placitando allegat. narratio ipsius Johan. qui tam, &c. cassari minime debet nec Breve dictorum Dni. Regis & Dnæ. Regine de Consultatione quoad primum articulum in narratione præd. mentionat. præfat. Gulielmo Episcopo Landaven. concedi debet, &c. quia dicit quod narratio illa quoad præd. primum

E

mum

mum articulum materiaq; in eadem content. bona & sufficiens in lege existunt ad præd. Guilielmum Episcopum Landaven. ad narrationem illam (quoad prædictum primum articulum) respondere compellend. ac ad breve dictorum Dni. Regis & Dnæ. Reginae de prohibitione in forma prædicta concessa manutenend. quam quidem narration. quoad præd. primum articulum materiamq; in eodem content. idem Johannes qui tam, &c. parat. est verificare & probare prout Curia, &c. Et quia præd. Episcopus ad narrationem illam quoad præd. primum articulum non respondebat' nec ille hucusq; aliquantulum dedit idem Johan. qui tam, &c. pet. judicium & dampna sua præd. sibi adjudicari, &c. Et idem Johan. Jones ulterius dicit quod præd. Guilielmus Episc. Landav. breve dictorum Dni. Reg. & Dnæ. Reginae de consultat. quoad resid. articulum in narrat. præd. mentionat. habere non deb. quia dicit quod placitum præd. per ipsum Guilielmum Episcop. Landav. (quoad resid. articulum in narratione præd. mentionat.) modo & forma præd. superius placitat. materiaq; in eodem content. minus sufficiens. in lege exist. ad præd. breve dictor. Dni. Regis & Dnæ. Reginae de Consultatione impetrand. ad quod idem Johannes qui tam, &c. necesse non habet nec per legem terræ tenetur aliquo modo

repondere. Et hoc parat. est verificare unde pro defectu sufficiens. Respons. in hac parte idem Johannes qui tam, &c. pet. judicium & dampna sua præd. sibi adjudicati, &c. Et pro causis Moration. in lege juxta formam statuti in hujusm. Casu nuper edit. & provis. idem Johannes qui tam, &c. Cur. demonstrat & ostendit quod apparet per Articulos in Narratione præd. mentionat. quod præd. Guilielmus Episcopus Landaven. ob offens. præd. in separalibus Articulis resid. Articulis. præd. express. conat. eundem Johannem Jones qui tam, &c. ab officio præd. deprivari & amovend. fore.

Et prædict. Episcopus Landaven. dicit quod placitum præd. per ipsum (quoad resid. articulum. in narratione præd. mentionat.) in forma præd. materiaq; in eadem content. bonum & sufficiens. in lege existunt ad breve dictor. Dni. Regis & Dnæ. Reginae de consultatione concedend. & habend. quod quidem placitum (quoad resid. articulum præd.) idem Episc. parat. est verificare & probare prout Cur. &c. Et quia præd. Johan. Jones qui tam, &c. ad placit. illud non respond. nec illud hucusq; aliquantulum dedit idem Episc. pet. judicium & breve dictor. Dni. Reg. & Dnæ. Reginae de Consultat. (quoad resid. articulum. præd.) sibi in hac parte concedi, &c. sed quia Cur. &c.

This Case was argued in Michaelmas Term in the sixth Year of this King, and it was shortly thus :

In a Prohibition the Plaintiff declared, That the Office of Chancelloꝝ of the Bishop of Landaff was an antient Office, and that as often as it became void, the Bishop of that See for the Time being used to grant it for one or two Lives, and to the Survivoꝝ of them.

That the said Office being void, Francis David late Bishop of Landaff did grant the same to D^r. Lloyd, and to the Plaintiff John Jones, to have and to hold the same to them, and to the Survivoꝝ for Life.

That D^r. Lloyd was dead, and the Plaintiff survived ; by Reason whereof he was entitled to the said Office.

That the Interpretation of all Grants did belong to the King's Courts, and not to the Spiritual Courts.

That the Defendant had sued the Plaintiff in the Ecclesiastical Court, and had exhibited Articles against him before D^r. Oxenden, that he was ignorant in the Canon and Civil Laws, that he had made Deputies who were unlearned in the said Laws, &c. that the Premises were true, and so prayed that D^r. Jones might be removed from the said Office for his Insufficiency.

That the said D^r. Jones was compelled to appear in the said Court to answer those Articles, and that the Defendant endeavoured to deprive him from that Office by a definitive Sentence in that Court contrary to a Prohibition, &c.

The Bishop pleaded, That he had not prosecuted the Plaintiff in the Spiritual Court against a Prohibition, and demurred upon the first Article, and the Plaintiff joined in the Demurrer. And as to the rest he pleaded, That all the Crimes contained in the other Articles are prohibited by the Canon Law, and ought to be punished by Ecclesiastical Censures, &c.

The Plaintiff demurred ;

And it was argued in his Behalf, That a Consultation ought not to be, because it was a Suit meerly for Deprivation ; and for that Reason (if there was no other) the Ecclesiastical Court ought to be prohibited.

This Office is a Matter of Freehold, which cannot be determined either by the Canon or Civil Laws ; and therefore it hath been held that an Assize will lie for the Office of the Register of the Court of Admiralty, which is a Freehold for Life ; for tho' the Proceedings in that

8 Rep. 47. b. Court are according to the Method and Rules of the Civil
Dyer 152. Law, yet the Right of that Office is determinable at the
Common Law.

2 Roll. Abr. So if a Question should arise concerning the Validity of
285. pl. 37. two Patents by which the Office of Register to a Bishop is
granted, this shall not be tried in the Spiritual Court,
notwithstanding the Subject-matter is spiritual, because
the Office it self being Matter of Freehold, is for that
Reason of temporal Cognizance.

3 Leon. In Michaelmas Term 29 Eliz. a Writ issued out of the Court
placit. 237. of Admiralty in the Nature of a Scire fac. to repeal Letters
Patents by which the Office of Vice-Admiral of two
Counties was granted to a particular Person; and because
this was triable at the Common Law, the Court gave a
Day to shew Cause why a Prohibition should not be a-
warded.

2 Brownl. 111. Many more Instances might be given of Cases to this
2 Roll. Rep. Purpose. But in Hillary Term 8 Jacobi, there was a Di-
306. spute about the Grant of this very Office to two, viz. to Dr.
Cro. Car. 55. Trevor and one Griffin; the Doctor released all his Right
to Griffin, who died; then the Bishop granted it to Robotham,
and Dr. Trevor pretending that he had a Right by Surbi-
borship by Virtue of a former Grant, made a Substitute,
who was disturbed by Robotham the new Grantee, where-
upon an Inhibition was granted in the Arches; and it
was agreed by all the Court, that tho' the Office was spi-
ritual as to the Exercise, yet as to the Right it was tem-
poral, and the Party having a Freehold in it made it de-
terminable at the Common Law.

Latch 228. The Case of Dr. Sutton is the single Authority against the
Noy 91. Plaintiff. 'Tis reported in several Books. He was Chan-
Cro. Car. 65. cellor to the Bishop of Gloucester, and Articles were exhibited
Palm. 450. against him before Ecclesiastical Commissioners; for that
by divers Canons no Person ought to be admitted to that
Office but such who was learned in the Canon and Civil Laws.
He pleaded that he had a Freehold in the Office for Life,
and ought to enjoy the same, and so prayed a Prohibition;
but it was denied, and the Reason given was, Because the
Commissioners might deprive him for Insufficiency.

2 Roll Abr. 'Tis true, the Judges of the Ecclesiastical Courts, and
286. pl. 39. not those of the Common Laws, are the proper Judges
of the Abilities of a Chancellor; and therefore they may
examine him as Dr. Sutton was examined; but at that
Time the High-Commission Court did extend its Power
too far in many Cases of Depriuation; for it cannot be
denied but Dr. Sutton had a Freehold in that Office. It
was

was the Opinion of Justice Croke who reported that Case, That the D^r. might have an Assize to try it if he had any Wrong done, which shews he had a Freehold; and if so, then admitting the Spiritual Court can try the Sufficiency of a Chancellor; yet if the temporal Courts have also in the same Case a Jurisdiction in respect of the Freehold, the Authority of the Ecclesiastical Court shall be ousted.

To prove this, Sir Timothy Hutton's Case was cited, who Hob. 15. obtained a Monition from the Archbishop of York to the Bishop of Chester. who, as Ordinary, had refused the Clerk presented by Sir Timothy, which Monition was, That the Bishop of Chester would either admit the Person, or appear before the Archbishop, &c. He did neither, and thereupon the Clerk was instituted by the Archbishop, and inducted by his Warrant; and afterwards a Suit being commenced before the Delegates, because the Institution was granted in London out of the Diocess of York, and by Consequence the Induction would be void, the Court of Common Pleas was of Opinion to prohibit the Suit; for tho' the Institution was spiritual, yet the Induction being a temporal Act, shall draw the Trial to the Common Law, otherwise the Right of Patronage would be tried in the Ecclesiastical Courts, and a Quare Impedit would seldom or never be brought.

If the Plaintiff was insufficient, it might create an original Incapacity so as to avoid the Grant; but 'tis not material whether he himself is learned or not in the Canon or Civil Laws, because the Office is granted to him to exercise by himself or Deputy; and no Man will deny, but he may constitute a Deputy learned in those Laws; and if he doth make an ignorant one, 'tis a Forfeiture of his Office.

There are some other Causes by which he might incur a Forfeiture, as Non-attendance, &c. as well as the Insufficiency, but that is not alledged: 'Tis true, that Inability hath been laid to his Charge, and the Bishop made a new Grant to try the Title at Law, and there was a Verdict against his Grantee, and now he seeks for Remedy in the Spiritual Court upon the same Pretence which he had at Law; and therefore ought to be prohibited.

Those who argued on the other Side held, That all the Articles exhibited against the Plaintiff were of Ecclesiastical Cognizance; and therefore the Proceedings there ought not to be stopped by the temporal Courts. Econtra.

Mich. 3 Ja.
2 Inst. 614.

This very thing hath been formerly complained on by Archbishop Bancroft, who exhibited Articles to the Lords of the Council of King James the first in the Name of the whole Clergy against the Judges in Westminster-Hall, for granting Prohibitions to Suits in the Spiritual Courts for Deprivations of Ministers for Insufficiency, because those Courts have the proper Judicature of the Learning and Sufficiency of the Person; and if Prohibitions should be granted in such Cases, this Inconvenience would follow, That the Knowledge of a Man in the Canon and Civil Laws must be tried by a Jury, which seems to be very absurd.

There is a Difference when a Suit is commenced in these Courts for Deprivation, which is a Thing of Ecclesiastical Cognizance, and when 'tis begun for a Thing purely temporal: Now in this Case the Qualification of the Person is the Matter which is first enquired into; but all the Authorities cited on the other Side where Prohibitions have been granted, were concerning temporal Things, as Grants, &c. which must be tried at Law.

If the King should grant an Office in this Court it will not be denied, but the Judges may remove such an Officer for Insufficiency, because they are proper Persons to judge of his Abilities.

No Instance can be given where Prohibitions have been granted for Things meerly of Spiritual Cognizance, but always where the Matter was temporal.

'Tis true, the Articles now exhibited, do suppose the Plaintiff to have a Grant, and to be in Possession of the Office; but they further alledge, That he ought not to enjoy it by the Law of the Land, because of his Insufficiency in the Knowledge of the Canon and Civil Laws: For which Reason he is to be censured by the Archbishop, who is to take Care that all the Canons should be executed, which are not repugnant to the Common Law, and by the 27th Canon made in the Reign of King James, no Man is to execute the Office of a Chancellor, unless he is skilled in these Laws, for he is obliged to act in his Office by them.

1 Mod. 22.

Many Instances may be given wherein this Court hath been very tender in granting of Prohibitions even in Cases where the Person concerned hath not been subject to the Jurisdiction of the Spiritual Courts; as an Incumbent of a Donative was cited there for marrying without a Licence: Now no Man will say that he is subject
to

to the Jurisdiction of the Ordinary, yet the Matter for which he was cited being of spiritual Cognizance, a Prohibition was denied.

So likewise a Mandamus was denied to the Dean of the Arches by the Court of King's Bench, to restore a Person to the Office of Proctor, tho' he is an Officer of whom the Common Law doth take Notice, and is likewise mentioned in several Acts of Parliament.

But if a Prohibition should be granted in this Case, it should be only quoad the Matter triable at Law: For where a Suit is begun in the Ecclesiastical Court for two Things, whereof one is of spiritual Cognizance, and the other temporal, and if by the Sentence to be given in such Case, the Punishments would be so intermixed, that it cannot stand for one, unless for both, there a Prohibition hath been granted; but if it be severed, then it ought to go to that Matter which is triable at Law.

2 Roll. Abr.

390. pl. 6.

314. pl. 1.

If this Person should fall under a temporary Disability, as Lunacy, &c. the Bishop may put in another; and so he may for any other Disability.

Upon these Reasons a Consultation was prayed, but the Court enclined against it.

Rex & Regina *versus* Evans.

THE Custos Rotulorum of a County was displaced, and another constituted in his Room, to whom the Defendant, being Clerk of the Peace, refused to deliver the Rolls.

1 Show. 282.

He was indicted for this Misbehaviour and found guilty, and thereupon was removed from his Office; and now he brought a Mandamus to be restored, and all this Matter being returned, a Motion was made to maintain this Return; and it was said that a Clerk of the Peace was a ministerial Officer to the Custos, and ought to deliver the Rolls to him at the End of every Sessions: 'Tis true, he has a more fixed Estate in his Office than the Custos hath, but still he is but his Deputy, and is to be removed by a Charge exhibited to the Justices in Writing.

Chief

Chief Justice. The Clerk of the Peace ought to make out all the Process, which cannot be done without the Rolls; when they are compleated, then he must deliver them to the Custos; but as long as they are in Process, they are to be with the Clerk of the Peace, and therefore it seemed reasonable that the Defendant should be restored. But three Judges were of a contrary Opinion.

D E

Term. Sancti Hill.

Anno 3 Gulielmi & Mariæ Regis &
Reginæ Angliæ, &c. 1691.

The City of Exeter *versus* Glide.

M Andamus to restore the Defendant to the Place of Alderman and Chamberlain of the City of Exeter. The Substance of the Return was, That the City is an ancient City and Body Politick, that the Mayor thereof is an ancient Officer; that there are twenty-four Aldermen, and so many Citizens there, who have used to be of the Common-Council and had a Court there, &c.

That the Defendant being an Inhabitant of the said City, was chosen Alderman thereof, and as such was a Justice of the Peace, which is an Office of Trust and Magistracy.

That he being so chosen, *Recessit elongavit & habitationem suam reliquit & deseruit & amovebat seipsum & familiam suam ad Toplam extra civitatem, &c. & officium suum voluntarie reliquit & neglexit, and sets forth wherein, &c.*

That several Courts of Common-Council were held there, of which he had Notice, but did not attend, being absent forty Times in three Years.

That when he was present he gave scurrilous and reproachful Language to the Court, for which he was removed from his said Office.

That he could not be restored, because he had not taken the Oaths before the first Day of August 1691. according to a late Act of Parliament, &c.

F

Those

Those who argued for the Defendant and against the Return said, That it was insufficient as to the Matter returned.

That the first Part thereof was not good for three Reasons:

1. Because 'tis not alledged that Topsam was extra libertates Civitatis; for it may be extra Civitatem, and yet within the Liberty of the City.

Besides, if it had appeared that Topsam was extra Civitatem, yet the Defendant removing thither did not give them Cause to deprive him of his Office, because it doth not appear by the Return that he was disabled from doing his Duty by Reason of his Abode there, or that his Attendance was necessary.

2. 'Tis not said that the Defendant absented himself, and removed his family without a reasonable Cause, as Sickness, &c. or how long he was absent.

Cro. Car.
133.

3. The next Cause assigned was, That he voluntarie neglected those Things which appertained to his Office as Justice of the Peace; this is too general, and a Return to a Mandamus ought to be as certain as a Return to a Habeas Corpus; and therefore where the Return of a Habeas Corpus was, that the Party was committed for insolent Behaviour and scurrilous Words spoken at the Council-Table, not mentioning what Words; this was held insufficient.

Cro. Car.
579.
Freeman's
Case.

The like Return of a Commitment by the Lords of the Council for divers Misdemeanors was held too general.

4. 'Tis returned, That the Defendant absented himself from several Courts, &c. but 'tis not said that he was duly summoned to such Courts; therefore it can be no Cause of his Removal, and the rather because it appears that there were a sufficient Number to hold those Courts, and if there is no particular Business, the Absence of one Justice of Peace may be excused.

Co. Lit.
233. a.

5. 'Tis not said that any particular Damage happened to the City, by Reason of the Defendant's absenting of himself; and Non-User of a private Office without some special Damage, is no Cause of Forfeiture.

3 Rep. 26.

6. The next Cause was, That he did publicly declare that he would never meet again, which amounts to no more than a Waver of his Office, which he may reassume at Pleasure.

11 Rep.
Bragg's Case.

7. Another Cause of his Removal was, for giving reproachful Language to the Mayor, &c. which might be a sufficient Cause to bind him to the Good Behaviour, but not to

forfeit his Office, and they ought to have returned the Words spoken that it might appear to the Court of what Nature and Import they were.

8. They return that he could not be restored, because he had not taken the Oaths before the first Day of August; but he is not obliged to it, for the Statute requires it only of these Persons who are in Office; now it appears by the Return, that he was not an Officer then, for he was deprived.

They have proceeded illegally, for they have deprived a Man of his Office upon a General Summons which is against Law; the Defendant ought to be summoned specially to shew Cause why he should not be removed for such Causes.

Serjeant Tremaine and Mr. Roe who argued to maintain the Return, answered these Objections:

(1.) 'Tis returned that the Defendant absented himself, and removed out of the City, and out of the County of the City, and 'tis not to be supposed that the Liberties reached out of the City.

(2.) As to the second Objection, it need not be returned, that he absented without a reasonable Cause; for to be absent for Debt may be a reasonable Cause, but 'tis a sufficient Cause to remove him.

(3.) To absent himself voluntarie is not too general: For being absent, 'tis reasonable that another should supply his Place, and a voluntary Absence, without saying more, is a sufficient Cause of Forfeiture.

(4.) The most material Objection is, That he absented himself, but was not duly summoned: Now a Summons is not necessary in this Case, because there is no Place appointed where Notice ought to be given him.

But admitting a Summons to be necessary, he had sufficient Notice, for 'tis returned that such a Day a Court was held, Et licet sufficienter summonitus, the Defendant did not come.

And to prove this, Dr. Merriott's Case was cited, who being one of the College of Physicians was summoned by the President to a Court, and not coming, he was deprived. Mich. 33 Car. 2.

The other Objections were held to be immaterial; but as to the last Objection about taking the Oath, it was said, That if the Defendant should be restored upon a Mandamus, 'tis a new Admission, tho' he may be in his old Office and Title, and therefore ought to take the Oaths.

But upon the whole Matter there being a particular Custom of the City alledged, That he must be an Inhabitant

Sid 14. 81.

tant to be capable of this Office, therefore Commorancy goes thro' the whole Case, and the Office being for Administration of Justice is determined by Cesser.

Every Custom which is reasonable, is for that Reason obligatory, and is rightly called Lex loci; if therefore by this Custom set forth upon this Return, the Defendant is to be an Inhabitant of the City, then his Departure from thence makes him want a legal Qualification to be an Alderman of that Place.

Curia. Three Justices were of Opinion not to grant a peremptory Mandamus: For they held that amongst the many Causes returned of the Disfranchisement of this Person, one was sufficient, which they held to be, that being an Alderman and a Justice of Peace of the City, &c. Habitationem suam deseruit & reliquit, and did dwell at Topsam.

'Tis incident to the Duty and Place of an Alderman to be resident where he is chosen, his very Name imports it, and Removal makes him incapable of doing his Duty where he ought: 'Tis not a Place of any Profit, but of Freedom and Government of the City.

3 Bull. 190.
1 Roll. Rep.
409.

'Tis said that Glide Deseruit & reliquit habitationem, which must be intended a total Desertion, and tho' he may return again it doth not appear when, so 'tis uncertain; and yet 'tis a good Return: For tho' there ought to be a convenient Certainty, yet 'tis not requisite to be very precise.

But supposing him to return again, it will not purge the Forfeiture after a Disfranchisement: 'Tis like the Case of Tenant for Life making a Feoffment, and entering before the Condition broken, notwithstanding which Entry the Reversioner may take Advantage of the Forfeiture.

Moor 135.
833.

But the Chief Justice was of another Opinion, That a Mandamus ought to go. It was agreed, That deserting his Office was good Cause of Disfranchisement; and so was absenting himself from the Council, and that the very Nature of the Thing did import so much: For every Alderman ought to be a Citizen, and an Inhabitant of the City where he is an Alderman; and if he removes, he ceases to be a Citizen, but may be a Freeman, tho' he wants that Qualification which enables him to be an Alderman.

It was agreed also, That there cannot be more apt and express Words of the Defendant's Absence, than the Words in this Return, Habitationem suam reliquit, and that he did inhabit at Topsam, extra Civitatem. That it was also his Duty to attend at the Common Council, and that it was contra debitum officii to be absent.

But that which made the Return not good was, That there was no particular Summons returned for the Defendant to appear and answer what should be objected against him; and therefore they had proceeded against him without hearing: and if so, his Disfranchisement was against Right and Justice.

This is the express Resolution in James Bagg's Case: And tho' 'tis said that he did not appear *Licet summonitus fuit*, that is not material; for he must and ought to have a particular Summons for a particular Charge; and 'tis not sufficient to summon him generally, and then to alledge particular Crimes against him, which he may not be prepared to answer.

If he left his Habitation for a Time, he might return, and coming before the Disfranchisement that might cure the Defect of his Removal, he might have some reasonable Cause for his Absence, as Sickness, &c. or going to the Bath, for the Recovery of his Health, or being employed in the Service of the King, and yet he may leave a Servant in his House, and be an Inhabitant there still.

Then as to the Certainty of the Matter here alledged, if it had been set forth in a Plea, it might have been sufficient, because the Party might reply and answer it; but being in a Return to a Mandamus, 'tis otherwise; and this is proved by the Case in Bulstrode cited by the other Judges to maintain this Return.

That Case was, it was returned, That Taylor was summoned before 30 of the Common Council in the Council Chamber, and did not aver, That at that Time a Common Council was held, and for this Uncertainty, that Return was held insufficient.

But by the Opinion of the other three Justices, the Return in this Case was held good, and yet afterwards in Michaelmas Term, 7 Guilielmi, one Morris brought a Mandamus to be restored to the Place of Capital Burgees of the Divizes in Wilshire, and a Return was made of the Causes of his displacing; but no Mention was made that he had any Notice or particular Summons to answer the Charge; and Judgment was given in that Case pursuant to the Opinion of the Chief Justice, that the Return was ill.

The

The CASE of the Inhabitants of *Hornsey*.

¹Show. 270.
291.

The Justices of the Peace upon their View presented, that a Common Highway leading from such a Place, &c. to the Church of Hornsey, was out of Repair, and that the Inhabitants thereof ought to repair it.

Upon a Traverse to this Presentment, the Jury find that the Way was out of Repair, but that it was not a common Highway.

The Question was, Whether this should have been pleaded specially, or whether it might be given in Evidence upon the Traverse?

And it was insisted that this depended upon the Construction of the Statute of 5 Eliz. upon which this Presentment was made, and upon that Clause thereof, wherein 'tis enacted, That the Presentment of a Justice of Peace upon his own Knowledge shall be of the same Effect in the Law, as a Presentment upon the Oath of twelve Men, who may thereupon assess fines at the Sessions, saving to every Person or Persons who shall be touched by such Presentment, to have his lawful Traverse to the same as they might have to any Indictment of Treasons.

Now on an Indictment upon this very Statute this Matter might be given in Evidence upon the General Issue, for if it had been pleaded that it was no Highway, such Plea would amount to no more than Not guilty, and would not have been good.

If then it may be given in Evidence upon this Plea, the Presentment in this Case is extrajudicial; for the Authority of the Justices is limited only to Common Highways, and it is found to be a private Way: Now they having a particular and limited Jurisdiction, when they exceed that, what they do cannot be justified; 'tis not like what they do relating to the Poor, for in that Case they are Judges.

Curia. Upon this very Statute the Defendant may traverse the Presentment of the Justices, and give Evidence that the Way is in Repair; for the Design of the Statute was to make the Presentment no more than an Inquisition, but before the Statute he could not have taken a Traverse: For then the Justices, as in Cases of forcible Entry, were the only Judges, which could not be traversed.

But in this Case they ought to have pleaded *reparare non debent* and that a Person (naming him) ought to repair; but by taking this Traverse, the Presentment is admitted to be good.

Sawyer *versus* Killigrew.Middle-
sex. fl.Covenant
for the
Sale of an
Office, and
the Ven-
dor to
have the
Pension
belonging
to it.

GEorgius Sawyer nupet de Westm. in Com. præd. Ar. alias dict. Georgium Sawyer, &c. sum. fuit ad respondend. Guilielmo Killigrew Mil. de placito quod teneat ei convention. inter eos factam secundum vim formam & effectum cujusdam scripti agreementi inde inter eos confect', &c. Et unde idem Guilielmus per Johannem Edkins Attorn. suum dicit quod ipse idem Guilielmus 27 die Julii anno Regni Dni. Caroli Secundi nuper Regis Angliæ, &c. tricesimo apud paroch. Sancti Martini in Campis in Com. præd. habuit tenuit & exercuit officium Vicecamerarii Serenissimæ Majestatis Katherinæ tunc Reginæ consorti præd. nuper Regis & modo Reginæ Dotissæ Angl. adhuc ibidem in plena vita existen. & proficuis eidem officio pertinen' & spectan. Cumq; etiam postea scilicet prædicto 27 die Julii anno Regni dict. nuper Regis 34 supradict. apud paroch. præd. Sancti Martini in Campis pro venditione officii præd. per eundem Guilielmum prædicto Georgio fiend. per quoddam scriptum agreementi inter eundem Guilielmum per nomen Domini Anglice **Sir William Killigrew** & prædictum Georgium per nomen Georgii Sawyer Ar. fact. quod quidem scriptum agreementi idem Guilielmus sub manibus & sigillis prædict. Gulielmi & Georgii confect. hic in Curia profert cujus dat. est eisdem die & anno præd. Georgius cum assensu & approbatione prædictæ Reginæ agreeavit cum prædicto Guilielmo pro officio suo Vicecamerarii prædicto quodq; ipse præd. Guilielmus durante vita sua naturali per agreement. prædict. Georgii & cum consensu præd. Reginæ teneret haberet gauderet & reciperet omnia proficua officii Vicecamerarii præd. adeo plene prout ipse idem Guilielmus eadem tunc tenuit, viz. Pension' annual. Ducent. Librar. legalis monet. per Annum per præd. Dominam Reginam durant. vita ipsius Gulielmi solvend. ac dona sua novalia annualia Angl. **his yearly New-Year's Gifts.** Centum & Vingt. Libr. legalis monet. per An. pro vita sua Ac etiam annual. feod. & Liberat. Angl. **Livery,** existen. sexaginta & sex Libr. per Annum acetiam salar. Alimentar. Angl. **Salary Board-Wages,** de Officio Gazophilacii Anglice **Cofferer's Office** Centum & triginta Libr. legalis monet. per annum in toto attingen. ad summam Quingentar. & sexdecim Librar.

Librat. per annum vel eo circiter Omnia quæ præd. Georgius per scriptum præd. obligavit se quod præd. Gulielmus haberet perciperet & gauderet durante vita ipsius Gulielmi naturali Quodq; ipse præd. Georgius nullam partem inde reciperet usq; post Mortem præd. Gulielmi prædictusq; Georgius per scriptum præd. agreavit accommodare prædicto Gulielmo durante vita sua ipsius Gulielmi usum Cubiculi, Anglice **Lodgings**, apud Domum vocat. **Somerſet-Houſe**, supra domos pro locatione Curruum Angl. **Coach-Houſes**, prout per scriptum præd. plenius apparet quodque ipse idem Gulielmus Killigrew per agreement. præd. & per consensum præd. Reginae fuit habere & durante vita sua naturali gaudere & recipere tota proficua præd. officii Vicecamerarii tam plenius quam ipse adtunc tenebat officium præd. Ducent. libras per Annum a præd. Regina pro pension. durante vita prædictæ Reginae ac etiam annual. novi Anni Dona de Centum & viginti libris pro vita sua ac etiam sua annual. feod. dona & liberat. Anglice **Liberties**, existen. sexaginta & sex libr. per Ann. Ac etiam sua Salar. Angl. **Board-Wages**, ab officio Gazophil. Anglice **The Cofferer's Office**, de Centum & triginta libris per Annum in toto se attingen. ad Quingent. & sexde-

cim libras per An. aut eo circiter quæ omnia præd. Georgius per agreementum præd. promissit ad & cum præd. Gulielmo quod ipse Gulielmus Killigrew reciperet & gauderet durante vita sua naturali & quod ipse Georgius non reciperet aliquam partem inde donec post mortem prædicti Gulielmi Et prædictus Georgius agreavit etiam cum prædicto Gulielmo accommodare prædicto Gulielmo durante vita sua usum cubiculi. apud domum Somerſet supra domos pro locatione Cur. prout per scriptum præd. plenius apparet Et idem Gulielmus in facto dicit quod prædicta Regina adtunc & ibidem omnia in agreemento præd. approbavit & eisdem consensit quodque ipse idem Gulielmus in performance. agreementi prædicti postea scilicet eisdem die & anno supradictis apud paroch. Sancti Martini in Campis debito modo sursum reddidit officium præd. Reginae prædictæ ac superinde in ulteriori performance. agreement. præd. præfat. Georgius per procuracionem ipsius Gulielmi in officium illud per prædictam Dominam Reginam ibidem debito modo admissus fuit & officium illud una cum proficuis eidem officio pertinen. & spectan. abinde hucusq; tenuit & gravisus fuit & adhuc tenet & gaudet & septingent. & octoginta libr. de prædicto salatio alimenrario

*Breach
assigned.*

ex

ex officio Gazophilacii solubil' officio Vicecamerarii præd. pertinen' pro sex Annis finit. ad festum Sancti Michaelis anno Dni. 1688. ad festum illud secundum convention. & agreement. præd. præfat. Georgii præd. Guilielmo solubil. devenner. & solvi debuer. quas quidem septingent. & octoginta libras idem Guilielmus non recepit & prædictus Georgius licet sæpius requisit. præd. 780 l. aut aliquem inde denar. eidem Guilielmo nondum solvit sed illas ei solvere omnino recusavit & adhuc recusat & sic idem Guilielmus dicit quod præd. Georgius convention. suam cum prædicto Guilielmo in hac parte fact. eidem Guilielmo secundum formam & effectum scripti il. non tenuit sed infregit & il. ei tenere hucusq; penitus contradixit & adhuc contradicit unde dic. quod deteriorat. est & damnum habet ad valentiam 800 l. & inde producit sectam, &c.

*The Defendant
pleads,
Actio
non, &c.*

Et prædict. **Georgius Sawyer** per Nathanielem Secomb Attorn. sum. venit & defend. vim & injur. quando, &c. Et dic. quod præd. Guilielmus Killigrew action. suam præd. inde versus eum habere seu manutene-
nere non debet quia dicit quod ipse idem Georgius a tempore confectio-
nis scripti agreementi præd. usq; diem impetrationis brevis originalis ipsius Guilielmi permisit ipsum Gui-

lielm. recipere annuatim omnes denariorum summas pro Salar. alimentar. ex officio Gazophilacii præd. solubil. eidem officio Vicecamerarii præd. pertinen. secundam formam & effectum agreementi præd. **Abfq;** hoc quod præd. Georgius a tempore confectio-
nis scripti agreement præd. hucusq; aliquod proficuum præd. officio Vicecamerarii spectan. vel pertinen. recepit vel gavifus fuit & hoc parat. est verificare unde petit judicium si præd. Guilielmus Actionem suam præd. inde versus eum habere seu manutene-
re, &c.

To this the Plaintiff demurs: Et pro Causis morationis in lege idem Guilielmus juxta formam statut. in hujusmodi casu edit. & provis. monstrat & Cur. ostendit has causas sequen. viz. quod præd. Georgius in placito suo præd. traversat materiam non allegat. in præd. narration. ipsius Guilielmi & quod placitum præd. est incertum & repugnans & caret forma, &c. (**Defendant joins in the Demurrer**) Et quia Justic. hic se advisare volunt de & super præmissis priusquam Judicium inde redant dies dat. est partib. præd. hic usq; a die Sancti Michaelis in tres septiman. de audiend. inde Judicio suo eo quod iidem Justic. hic inde nondum, &c. Ad quem diem hic ven. tam præd. (**Quer.**) quam prædict.

G

(Defend.)

(Defend.) per Attorn suos pred. & super hoc vis. præmissis & per Justic. hic plene intellectis videtur eisdem Justic. hic quod præd. placitum præd. Georgii modo & forma præd. superius placitat. materiaque in eodem content. sufficien. in lege existunt ad ipsum Gulielmum ab Action. sua præd. inde versus ipsum Georgium habend. præcludend. prout idem Georgius superius allegavit Ideo conf. est quod præd. Gulielmus nihil capiat per breve suum præd. sed sit in misericordia pro falso clamore suo Et quod præd. Georgius eat inde sine die, &c.

The Agreement is set forth in the Pleading, and it was in these Words :

This is to declare, That I George Sawyer have by her Majesty's Consent and Approbation, as followeth, agreed with Sir William Killigrew for his Vice-Chamberlain's Place, and that he the said Sir William Killigrew is, during his natural Life, by my Agreement, and with her Majesty's Consent, to

hold, enjoy and receive the whole Profits of the said Vice-chamberlain's Place, as fully as he himself doth now hold the same : that is to say 200 l. per Annum from her Majesty by Pension during her Life, and also his yearly New-Year's Gifts of 120 l. for his Life, and also his yearly Fees and Gifts and Liberies, being 66 l. per Annum, and also his Salary Board-Wages from the Cofferer's Office of 130 l. per Annum, in all amounting unto the Sum of 516 l. per Annum, or near it; all which I do engage my self that Sir William Killigrew shall have, receive, and enjoy, during his natural Life, and I am to receive no Part thereof until after his Death; and I do also agree to lend the said Sir William Killigrew, during his Life, the Use of his Lodging in Somerset-House, over the Coach-House : In Witness whereof I have hereunto set my Hand and Seal this 27th Day of July, 1682.

Upon this Agreement an Action of Covenant was brought ^{2 Vent. 79.} in the Common Pleas, wherein the Plaintiff did set forth, That he was Vice-Chamberlain to the Queen Dowager, and that there was an Agreement between him and the Defendant for the Sale of the said Office, which the Defendant was to have by the Consent of the Queen; that by the said Agreement the Plaintiff was to enjoy a Pension during the Life of the Queen, and the other Profits of the Office during his own Life; that pursuant to this Agreement he surrendered the Office to the Queen, and procured the Defendant to be admitted, which was accordingly done, and that he enjoyed the Office, and for six Years Arrears of Salary this Action was brought.

The Defendant pleaded in Bar, That he had suffered the Plaintiff to enjoy the Profits, &c. according to the Agreement, and traversed, that he had received any Part of the Profits of the said Office; and upon a Demurrer Judgment was given upon the Point of pleading, That the Traverse was ill.

This Judgment was for the Defendant Sawyer, That the Bar was good.

And upon this Judgment a Writ of Error was brought in the King's Bench, and the Question there debated was, Whether this was a good Grant or not? And it was agreed, That nothing but Usage could support it.

Then it was argued, That this Covenant was in the Nature of a personal Warranty, and not to be compared to a Covenant for quiet Enjoyment, where, upon a Disturbance, the Party hath a Remedy over; but this Action rests upon the Covenant it self, and doth not wait upon the Office: For if the Queen should die, the Defendant is still bound, and so he is also if the Profits of the Office should be sunk.

'Tis more properly like the Case of Robinson and Cuthbert, ^{Mich. 21 Car. 2.} which was in Consideration that the Plaintiff would deliver so much good Silk, the Defendant promised to see him paid.

So another Promise was, That if the Plaintiff would deliver Wines to A. the Defendant said, He should not lose a Penny.

In both which Cases the Inference is, That he will pay it: 'Tis an Obligation and a peremptory Undertaking for him to pay the Money.

An Obligor in a Bond was not to be found, whereupon a third Person promised the Obligee, That in Consideration he would give him a Letter of Attorney to put the Bond in Suit, That he would warrant the Debt; the Breach was held to be well assigned; that the Plaintiff had performed the Consideration, and the Defendant had not paid

Roll. Abr. tit Voucher 738. pl. 1.

the Money (without saying that the Obligor had not paid it) because the Warranty was personal.

Sid. 170.

So where a Man warranted to the Plaintiff all the Money which another Person owed him, the Breach is well assigned in not paying the Money, and not in the not warranting.

Econtra. The Meaning of this Covenant must be, That the Plaintiff must do some Act in order to receive the Profits, as to ask it of the Treasurer: The Defendant is not bound by this Agreement to pay the Money, but only restrained from intermeddling with the Salary, &c.

Cro. Eliz.
914.
Yel. 30.
idem.

He engaged that the Plaintiff should receive the Profits of this Office, and in assigning of the Breach, the Plaintiff doth not shew that he was disturbed by the Defendant, or any wise hindered by him from receiving it; and therefore the Breach is not well assigned, and of this Opinion was the Chief Justice and Mr. Justice Eyre: The other two Justices contra. These two held that there was a good Breach, and that the Bar was good, and a direct Answer to the Breach, so all were against the Plaintiff in the Writ of Error; wherefore he proceeded no further, and there it hangs.

Newport *versus* Godfrey.

Mich. 1 WILLIELMI, Rot. 200.

3 Levinz.
267.
2 Ventris
184.

DEbt in the Detinet against the Defendant, as Executor of Turner, for Rent-arrear, in the Life-time of the Testator upon a Lease-parol; and it appeared upon the Declaration that the Lease expired in the Life-time of the said Turner.

The Defendant pleaded several Bonds entred into by the said Turner for the Payment of Money which he assered to be just Debts, and that he had administered all *præterquam*, &c. which he retained to satisfy the said Bonds.

And upon a Demurrer to this Plea, Judgment was given in the Court of Common Pleas for the Plaintiff, that the Rent ought to be paid before the Bonds. For tho' it was objected, That if the Lease had not been determined, the Rent then due might be preferable to a Bond-Debt, because the Goods of the Testator are liable to a Distress: But now the Lease being determined, it was only a personal Thing, and could not take Place of Specialities; yet the Court was of Opinion that the Debt for
this

this Rent did still labour of the Realty, and that the Determination of the Lease made no Alteration in the Contract, but that the Action might be maintained by Reason of the Profits of the Lands which the Testator had received.

Upon this Judgment a Writ of Error was brought, and it was affirmed in this Court. Vid. 2 Cro. 233. Barwick versus Foster, Fitz. Abr. tit. Avowry 240.

Grimly versus Fawlkingham.

In a Prohibition to a Libel in the Spiritual Court for the Tithes of a Water-Corn-Mill, a Modus was suggested. 1 Show. 280. 2 Inst. 621. F.N.B. 51. h.
The Defendant confessed the Modus as to Part, but said that there was an Addition to the ancient Mill; viz. another pair of Mill-stones (your Mill anciently had but one Pair of Stones, but of late had two Pair) and so prayed that the Prohibition might only go to the Tithes of the ancient Mill.

It was argued that most Mills of common Right ought to pay Tithes, and that Executors may be sued for Arrears of Tithes of Mills in the Life-time of the Testator.

'Tis true, no Tithes ought to be paid for Fulling-mills, because the Gain is uncertain, and ariseth by the Labour of Men, and therefore Tithes in such Cases ought not to be paid without a special Custom to warrant it, but only of things renobant. 3 Bull. 212. 2 Cro. 523. Lit. Rep. 314. 1 Roll. Rep. 84, 405. 1 Roll. Abr. 656, 652. placit. 3.

Prescription to a Modus to pay so much every Year in Lieu of all Tithes issuing out of two old Houses and Mills, and afterwards the Owner of the Houses built two new Corn-mills, under the same Roof; it was held that these new Mills should not be discharged of Tithes by Virtue of the old Modus, because such Tithes are not merely predial but personal likewise, and the Miller ought to pay the 10th Dish; tho' 'tis said in the same Book, that Tithes of Paper and Fulling-mills are personal.

Econtra. It was said that the Modus extends as well to the new Mill-stones as to the old: for if these break, the Modus goes to the new, so that tho' they are laid down in any other Place, yet if they are under the same Roof, the Prescription will extend to all, because the Mill is the Substance to which it chiefly relates; the Prescription is to the Mill in general, and 'tis but accidental whether there are one or two pair of Stones therein, 'tis still but unum molendinum, and must be so demanded in a Præcipe,

In

In Lutterel's Case it was held, That if a Man had Estovers by Prescription, the Alteration of the Rooms in his House, or adding new Chimneys or Rooms will not destroy the Prescription.

So if an old Mill or House fall, or is pulled down, the Owner may re-edify upon the same Foundation which is the perdurable Part of the Estate, and in Judgment of Law includes the new as well as the old House when standing.

A Prohibition was granted.

D E

Term. Sanct. Mich.

Anno 3 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1691.

College of Physicians *versus* Bush.

Trin. 3 Guilielmi, *Rot.* 717.

THEY brought an Action of Debt upon the Statute of H. 8. which prohibits the Practise of Physick within London or seven Miles thereof, under the Penalty of 5l. for every Month, except the Party is approb'd under the Seal of the College: And for practising Physick in Westminster for so many Months, this Action was brought. 14 H. 8.
cap. 5.1

The Defendant pleaded Letters Patents of King Charles the Second, by which free Liberty is given to French Protestants to exercise the Faculty of Physick in London and Westminster, &c. and that he was a French Protestant, &c.

Upon a Demurrer the Plea was held ill; but then an Exception was taken to the Declaration, which sets forth, That the Defendant practised Physick in Westminster, and doth not say that it was within seven Miles of London, for which Reason the Defendant had Judgment.

Rex

Hannam *versus* Woodford.

Trin. 3 Willicelmi, Rot. 257.

3 Levinz.
312.

After the Death of a Cognizee in a Statute, his Administrator sued forth an Extent, and the Liberate being returned, he made an Assignment of the Lands without an actual Entry, or without executing the Deed upon the Land.

And the Question was, Whether this Assignment was good or not?

It was compared to an Interesse Termini, and that this Assignment was good, because a Man may grant or dispose what he has not actually in Possession.

2 Cro. 659.

2 Roll. Rep.

241.

1 Rol. A2r.

859.

Palm. 208.

Bridg. 12.

And to prove this Assertion, the Case of Powlesley and Blackman was cited, which is reported in many Books, and is shortly thus:

A Mortgage was made of Lands for Payment of Money within the Space of five Years at several Payments; and in the same Deed it was agreed, That the Mortgagee should not intermeddle with the actual Possession of the Profits until default of Payment, &c. Afterwards the Mortgagor made a Lease of the Lands for six Years; the Lessee entered, the Money was not paid, and at the End of the Term the Lessor had his Estate again; the Mortgagee, without any lawful Entry, devised the Lands to his Son, and died; and it was adjudged, That the Devise was good, which could not be, if the Lease made by the Mortgagor had been a Disseisin.

But on the other Side it was said, That by the Return of the Liberate, the Administrator had no Right, only a Possession in Law, Quousque de debito fuerit satisfactus; the proper Way had been to bring an Ejectment upon the Liberate to recover the Possession, and then the Assignment had been good; and of this Opinion was the Court. Vid. Plow. 423. 1 Inst. 270. a.

Rex & Regina *versus* Buckeridge & al,

An Information was brought against the Defendant for not repairing of a Highway *ratione tenuræ* between Stratford and Bow: It was tried at the Bar by an Essex Jury.

The Evidence for the King was, That Mawd the Empress gave certain Lands to the Abbess of Barking to repair this Way, that the Abbess, &c. sold those Lands to the Abbot of Stratford, who by the Consent of his Convent, charged all his Lands for the Repair of the Way; and thus it stood till the Dissolution. &c.

Then all the Lands of the Abbot of Stratford being vested in the Crown, were granted to Sir Peter Mewtis, who held them charged for repairing the Way, and from him by several mesne Conveyances they came to the Defendants: This was proved by several Witnesses living in other Parishes. none being admitted to give Evidence, who lived in either of the said Parishes of Stratford or Bow.

But it was said for the Defendants, That no Lands shall be chargeable for the repairing this Highway, *ratione tenuræ*, but such which were originally given for that Purpose, and so the Defendants could not be Guilty, unless it was proved that they had some of those Lands in Possession which were given by the Empress to the Abbess of Barking, and that no other Lands were liable, formerly belonging to the Abbot of Stratford, but such which he bought of the said Abbess.

The Court was of Opinion, That upon this Evidence all the Lands of the Abbot were liable to repair this Way, and directed the Jury accordingly, who found for the Plaintiffs.

Rex & Regina *versus* Alsop.

THE Defendant was convicted before the Justices of Peace in Sessions, upon an Indictment brought against him upon the Statute of E. 6. and upon that Conviction he was committed, and afterwards brought a Habeas Corpus, and being in Court, several Exceptions were taken to the Indictment.

1 Show. 339
2 & 3 Ed. 6.
cap. 14.

First, It was agreed on all Sides, That this Statute was in Force, by which 'tis enacted, That no Person shall shoot in any Place any Hail-shot, or more Pellets than one at one Time; upon Pain to forfeit for every Time that he or they shall so offend, 10 l. and Imprisonment for three Months.

(1.) One Exception was, that the Indictment sets forth, That the Defendant did shoot Conies in Coddon Wood, but it doth not appear where he stood when he shot, which may be in
H several

several Mills, and the shooting being the Offence, it must be certainly laid; so that upon this Indictment there can be no Issue.

(2.) There is no Judgment given upon this Indictment; for 'tis said, Quod forisfaceat, &c. it should have been forisfaciat: 'tis like scire for sciri.

But the Court would not quash the Conviction upon these Exceptions.

12 Rep. 97.
Cro. Eliz.
601, 697.

At another Day the Matter of Law was spoke to, That the Justices of Peace have no General Jurisdiction to hear and determine this Offence: For tho' their Commission is, ad pacem conservand. yet that Power is restrained to Cases only of open Violence: So likewise by Virtue of their Commission they may enquire, De omnibus & singulis malefactis & offensis, which Words also have a Qualification of such Offences only into which they may lawfully enquire.

If therefore they have no Power by the general Words of their Commission, which are restrained as aforesaid, then they must have an Authority by the Statute, but that gives them none, therefore the Judgment ought to be quashed.

Econtra. The Justices have Cognizance of this Matter both by Statute, and also by Virtue of their Commission.

33 H. 8.
cap. 6.

1. By Virtue of the Statute of 33 H. 8. which enacts, That no Person shall shoot in a Gun under the length of one Yard, on pain to forfeit 10 l. Power is thereby given to the Justices of Peace in their Sessions to hear and determine Offences contrary to that Law.

Now this Indictment was concluded generally contra formam statut. so that any Statute will warrant and maintain this Indictment, which gives the Justices Authority in such Cases.

But the Offences against the Statute of Ed. 6. are also enquirable by them in their Sessions, because that Statute is not introductory of a new Law, but supplemental to that of H. 8. 'Tis recited therein, and 'tis provided, That it shall not restrain those from shooting who have Authority so to do by that former Act; and that all others who shall presume to shoot, shall present their own Names to the next Justice of Peace, who is to see them recorded at the Sessions: So that it seems to be an Offence inquirable there.

To this it was answered, That the Names of such Persons were to be presented and recorded at the Sessions, that the King might know what Men were able to serve him in his Wars.

1

2. That

2. Th. t the Justices of Peace have Authority to enquire into this Offence by Virtue of their Commission, which gives them Cognizance of several Acts of Parliament ever since they themselves were erected by the Statute of E. 3. and it would be a vain Thing to stuff their Commission with the Recital of several Statutes, when the general Words will and may give them sufficient Power.

In the beginning of their Commission 'tis Assignavimus vos, &c. ad pacem conservand, &c. ac ad omnia statuta & ordinationes pro bono pacis nostræ, &c. custodiend. which are general Words, and this is an Offence against the Peace, and therefore they have Power to enquire into it.

And of this Opinion was Justice Dolben.

Chief Justice contra. The Justices of Peace by the general Words of their Commission, have Power to punish Offences against any Statute made concerning the Peace of the Nation; but by this Act, upon which this Indictment is brought, the Peace is in no wise concerned, because the Offence thereby created is for want of due Qualification of the Person to shoot, which is not an Offence against the Peace.

This cannot be an Indictment upon the Statute of H. 8. because they do not set forth the Length of the Gun, which by that Law ought to be a Yard long; and therefore the general Conclusion contra formam statut. will not help it: And for these Reasons the Indictment was quashed.

But it was agreed, That the Party might be indicted for this Offence before the Justices of Oyer and Terminer, but not before Justices of the Peace, for want of Jurisdiction.

The Countess of Winchelsea against the Lady Maidstone.

TRover for Goods, tried at the Bar by a Jury of Kent; upon the Trial the Case was thus:

The Earl of Winchelsea in the Month of August, 1689. made his Will, and hereby devised to the Plaintiff all his personal Estate to pay his Debts, &c.

The Will was proved :

But immediately upon the Death of the Earl, and before he was buried, the Defendant who was married to the eldest Son of the said Earl, took Possession of the House and Goods in the Declaration mentioned.

The Plaintiff produced the Will under the Probate, then he proved that the Goods were appraised at 1800 l. He produced an Inventory of them, and proved that they were the same contained in the Declaration ; he likewise gave Evidence of the Conversion.

The Defendant produced a Deed of Gift of these Goods made by the Earl in the Year 1650. Habendum to Trustees therein named for the Use of his then Lady (but since dead) for the Term of her natural Life, and afterwards that they should be and remain to his Children.

The Counsel for the Plaintiff admitted, That tho' the same Goods for which the Action was brought, were likewise contained in the Deed of Gift, yet that Deed could not be good against a Creditor.

That the Earl being in Debt, a Judgment was obtained against him, and by a Testatum Fieri fac. his Goods were taken in Execution, and sold by the Sheriff in Hillary Term, 1657. for 800 l. which was after this Deed of Gift.

It was proved that his Steward paid the Money, and redeemed the Goods, and the Earl gave him a Bond for Repayment, which was done, and the Bond cancelled, so that by this Means he had gained a new Property.

A Copy of the Testatum Fieri fac. was produced, and likewise the Bill of Sale by the Sheriff, and the Bond cancelled, and thereupon the Plaintiff had a Verdict.

Sir James Smith's Case.

Farrel. 77.
6 Mod. 78.
1 Vent. 66.

HE brought a Mandamus to be restored to the Place of an Alderman of the City of London.

The Substance of the Return was, That Sir James Smith was an Alderman of the said City on the 13th Day of February, 1688. That he was duly chosen according to the Custom, &c.

That he continued an Alderman thereof until the first Day of August 1689. That he did not take the Oaths enjoined to be taken by all Persons in Office by Virtue of an Act of Parliament made in the first Year of the King and Queen, which Oaths were to be taken before the said first Day of August, for which Reason he was deprived, and hath not been elected since.

The Words of the Statute 1 Guilielmi, &c. are, If any Person NOW HAVING any Office or Employment Civil or Military, shall neglect or refuse to take the Oath thereby appointed to be taken, &c. before the first Day of August, 1691. or sooner, if required, &c. that in such Case the said Office and Employment of the Person so neglecting, &c. shall be void.

The Question was, Whether Sir James Smith was an Alderman at the Time of the making that Statute, and whether he continued so to be until the first Day of August, 1689?

And this depended upon the Judgment in the Quo Warranto against the City of London: For if the Corporation was dissolved by that Judgment, then by consequence Sir James Smith was no Alderman at the Time of the making of the Act 1 Guilielmi, and was not obliged to take the Oaths, &c.

And if so, then another Question will arise, Whether by the Act for the reversing the said Judgment, and for restoring the City to its ancient Rights, (wherein the Judgment is recited and declared to be illegal) the said Sir James Smith ought to be restored? The Words are these.

And be it enacted, &c. That all Officers and Ministers of the said City, that rightly held any Office or Place therein at the Time when the said Judgment was given, are confirmed, and shall have and enjoy the same as fully as they held them at the Time of the said Judgment given, except such who have voluntarily surrendered any such Office, or have been removed for any just Cause.

It was insisted, That by the Judgment in Quo Warranto (if legal) nothing was altered, for Execution was never sued forth; it was like a Recovery in a Quare impedit, where in the Party has a Title to a Writ to the Bishop; but 'till then the Church is full.

3 Inst. 118.
Ryley pl.
cito 6. 188,
277.

Now whether a Body Politick may be dissolved or not, is a Question of great Consequence, and never yet received any judicial Determination; it was a Thing not thought on at the Dissolution of Monasteries, and never attempted but in the late Reigns.

But

But admitting such a Judgment could be given, it was not intended that the Corporation should be dissolved thereby: for Sir Robert Sawyer, who was then Attorney General, said, It was only that the King might lay his Hands gently on the Franchises.

It may be objected, That the very Essence and Being of a Corporation consists in its Franchises; when these are gone or seized, the Corporation is dissolved.

But a Corporation is not known by such Name, nor taken Notice of as such by any Law-Book or Author of Credit.

Palm. 501.

In Heyward and Fulcher's Case 'tis said, That a Name and Power makes a Corporation, and this may be either by Description, Patent, or Acts of Parliament.

Some Writers, and those of no mean Account in the Law, affirm, That tho' the King may create a Corporation, yet he cannot dissolve it, neither can they dissolve themselves by any voluntary Surrender; but if any of the Members offend against the Privileges granted to them, a Quo Warranto may be brought against such Offenders only, and not against the Body Politick.

They further affirm, That nothing can be seized into the King's Hand, but such which was part of the ancient Inheritance of the Crown, and then it is immediately extinct; or else such Things which have an Existence and may be restored, as Fairs, Markets, &c.

That most of the Authorities which seem to warrant a contrary Opinion, happen to be in the latter Part of the Reign of H. 3. and between that Time and the Reign of R. 2. which were tumultuous Times, and most of the Corporations were then seized; but then also the King took more or less of the Government as the Party offended.

Ryley 277.

If the Fault was in the Mayor, then he seized the Mayoralty and put in a Custos, which was in order to preserve the Corporation, and the Writs of Restitution were always according to the Seizure.

'Tis true, the Judgments in Quo Warranto's are various, as when the Franchises were totally usurped, then the Judgment is quod extinguantur; but when they are abused, 'tis quod capiantur; which imports a future Time, and therefore that the Franchises have still a Being; and this is the Judgment in this very Case: But it seems to be contradictory in its self, for the first Part of it is, Quod libertat. & privilegia, &c. capiantur & seisantur in manus Regis: And the latter Part of it is, Quod capiantur ad satisfaciend.

satisfaciend. Domino Regi de fine suo pro usurpatione libertat', &c.

Then as to the Act of 2 Gulielmi, it sets forth, That this Judgment was illegal and arbitrary, which is as much as to say that it had not the Form of Law; and therefore 'tis void; if so, the Corporation was still in being.

Neither can it be objected, That the Parliament was of Opinion that the Franchises were gone by that Judgment: for tho' the Act takes Notice that it would tend very much to the Peace of the Kingdom to restore the Mayor, Commonalty, and Citizens, &c. to their ancient Liberties from which they had been deprived; yet it doth not follow from thence, that they were deprived by this Judgment; for it might be by Force or any other Means:

May, 'tis so far from importing that the Corporation was dissolved, that it supposeth it to have Existence: for it enacts, That all Officers who had rightfully any Office at the Time of the Judgment, shall be confirmed; which implies, That the Body Politick had then a Being, otherwise those Words are of no Signification.

Serjeant Pemberton argued for a peremptory Mandamus, and that by the Judgment in the Quo Warranto the Corporation was dissolved; for otherwise the Liberties and Franchises must remain, which could not be, because *Capiantur & seiscantur in manus Regis.* *Econtra.*

And this appears more plain from the very Nature of a Corporation, which is an artificial Body constituted of several Members like a natural Body: 'tis united by its Franchises, and 'tis called a Franchise by the very Letters Patents of Incorporation; for all Corporations were made by Letters Patents or Acts of Parliament, tho' in some Places they prescribe to them, which in it self implies a former Grant.

If then this Body Politick is a Franchise, or if the essential Part thereof is made up, and consists in Franchises, then it seems plain, that in all Concessions and Grants of Franchises there is a tacit Condition implied in those Grants, that the Persons to whom they are made shall use them justly; and 'tis such Condition, which if broken, will determine the very Grant it self.

This is one Way by which a Corporation may be destroyed: 2 Inst. 222: So likewise for Misuser and Abuser, the whole Franchises are forfeited for ever. 20 Ed. 4. 5:

Now the proper Remedy for the King to take Advantage of such a Condition broken is by a Quo Warranto, which is called The King's Writ of Right, in which the supposed Abuse of Fran-

franchises is examined, and either the Defendant is acquitted or the franchises Capiantur, which is the final Judgment.

2 Inst. 282,
283.

'Tis true, there are two Sorts of Judgments upon the Proceedings on this Writ; for if the Party make Default at the Return of the Venire facias, then the Judgment is, Quod capiantur nomine districtionis, which is but a temporary Judgment till he appear; and 'tis replevible; but if the Replevin is not brought during that Term in which the Venire fac' is returnable. the franchises are for ever lost.

Co. Entr.

527.

15 Ed. 4. 7.
Yel. 190.

But if he appear and maketh out no Title, then the Judgment is, Quod libertates, &c. capiantur in manus Regis, &c. So that immediately upon entring of the Judgment the Party is ousted, and no more Liberty remains in him, the franchises being all determined.

9 Rep. 98. a.

As for the Word Capiantur in the Judgment, it cannot be said that it implies any future Time when they may be taken, &c. for it amounts in legal Construction to Capiuntur; so in an amoveas manum, 'tis Quod manus Domini Regis amoveantur, because when the forfeiture is found the Party is immediately out, and the King is then in Possession, and so the Law has been taken in such Cases.

Raft. Entr.
540.

Therefore in a Quo Warranto brought against the Defendant for claiming of a Court-Leet, the Judgment was, That it should be seized for Misuser, and postea the Defendant rehabere per finem & ei conceditur: Now if it had not been taken into the King's Hands, what need was there of the Words rehabere, & ei conceditur, as in the Entry of that Judgment.

Co. Entr.

539. b. 560.

Some Judgments in this Proceeding are entred more at large, that the Liberties, franchises, and Privileges in manus Domine Regine seiscantur, and that they remain in her Hands, &c. Et quod amodo eadem libertates Franchisæ & privilegia extinguantur & amoveantur, and that the Offenders Capiantur to satisfy the Queen, De redemptione sua pro usu & usurpatione suis super dictam Dominam Reginam de libertatibus, &c.

15 Ed. 4. 7.

But by the Words Capiantur in manus Regis, which is the usual form of the entring of the short Judgment given in such Cases, all the franchises are gone, and that so the Law has been constantly taken to be.

One of the Questions put in Sir George Reynell's Case was, Whether upon the forfeiture of the Office of the Marshalsea, the King could seize it without a Scire fac' first brought: And the Ld. Chancelor having asked the Judges who assisted him,

how

how a Seizure might be made: My Lord Coke answered, That by an Inquisition and Award of Seizure, the King is in Possession, without any other Writ or Commission for that Purpose; which shews, That by the Word Capiatur there is a final Judgment, and the Franchises are dissolved.

There are but three Cases which can be cited out of all the Law-Books to prove, That there ought to be a Scire fac. before the King can make a Seizure; and these are,

6 Edw. 2. Membrane 2.

2 Inst. 572.

Ryley placita Parliament. 168, 169.

Which Cases are not to this Purpose; for 'tis true, as my² Inst. 572. Lord Coke hath observed upon the Statute of Articuli Super Chartas, That if an Ouster le maine be brought, and afterwards a precedent Record is found to maintain the King's Title, he cannot reseize without a Scire fac. The Reason is, because he was out of Possession, and by the Office so found, his Title accrued before the Libery; but where a Judgment is final (as in this Case) the Franchises are then actually in the Possession of the King, and the Corporation is dissolved; for the Liberties which united the Body Politick are taken away, and then 'tis but as one single Person, nothing being left to distinguish them by the Name of Mayor, Aldermen, &c. and therefore there needs no Scire fac. in such Cases.

That the Corporation was dissolved appears yet more fully by the Act of 2 Willielmi, mentioned before; for thereby the Judgment is declared to be illegal, and in the Preamble, 'tis said, That it would tend very much to the Peace of the Kingdom to restore the Mayor and Citizens, &c. to their ancient Liberties, of which they had been deprived: Now 'tis a very foreign Construction to say, That they might be deprived by Force, and not by that Judgment, when 'tis plain that it was the Opinion of that Parliament, that they were deprived of their Liberties by that Judgment, for otherwise those Words are void.

If therefore by this Judgment the Corporation was dissolved, then Sir James Smith was no Alderman at the Time of the making the Act of 2 W. & M. c. 8. and having no Office

at that Time, is not therefore obliged to take the Oaths; and tho' he has not taken them, yet he ought to be restored.

Curia. A Corporation may be dissolved: for 'tis created upon a Trust, and if that be broken, 'tis forfeited; but a Judgment of Seizure cannot be proper in such a Case, for if it be dissolved, to what Purpose should it be seized?

Therefore by this Judgment in the Quo Warranto the Corporation was not dissolved; for it doth neither extinguish or dissolve the Body Politick.

Where-ever any Judgment is given for the King for a Liberty which is usurped, 'tis Quod extinguatur; and that the Person who usurped such a Privilege, libertat, &c. nullatenus intromittat, &c. which is the Judgment of Ouster; but the Quo Warranto must be brought against particular Persons.

2 Cro. 160.
15 Ed. 4. 7.
3 Rep. Wal-
ker's Case.

But where 'tis for a Liberty claimed by a Corporation, there it must be brought against the Body Politick, in which Case there may be a Seizure of the Liberties, which will not warrant either the Seizure or dissolving of the Corporation it self.

Therefore the Corporation being not dissolved, Sir James Smith was still an Alderman, and ought to take the Oaths before the first Day of August; and so Judgment was given in Hillary Term following, That no peremptory Mandamus ought to go.

Justice Dolben doubted upon the main Point, for it seemed to him, That if the Liberties of the City were seized, then Sir James Smith was no Alderman, &c. and that the Parliament of 2 Willielmi did affirm the Judgment to be of force, for they did not declare it to be void ab initio, but illegal.

Jefferies *versus* John Legendra.

2 Salk. 443:
3 Levinz.
320.
1 Show. 320.

AN Action on the Case was brought by the Plaintiff upon a Policy of Assurance of Goods from London to Naples upon the Ship called the Olive-Branch; the Adventure was to begin at the Time of lading of the Ship at London, and seven Guineas was the premium for every 100 l. insured, Dangers of the Seas only excepted.

At the bottom of this Policy, these Words were subscribed, upon which the Question did now arise, viz.

Warranted to depart with Convoy.

The Plaintiff in his Declaration did aver, That the Ship did depart with Conboy, that he was taken by the French, that the Defendant had Notice of it, but did not pay the Money, &c.

Upon Non assumpsit pleaded, the Jury found a special Verdict to this Purpose, viz.

They find the Policy of Assurance, and that the Defendant subscribed; That the Ship departed out the River Thames under the Conboy of a Man of War; that about the Isle of Wight he was separated from the Conboy by bad Weather, and put in at Torbay, and was there detained by contrary Winds; that the Master of the Ship expecting to meet the Conboy departed out of the Harbour, but could not meet her, being hindered by Stress of Weather; that the Ship was taken by the French, and so lost, &c.

The Question was, What the true Meaning of those Words are, viz. Warranted to depart with Convoy?

The Counsel for the Plaintiff would have it, That no more was intended than a Departure with Conboy at the first setting out of the River; which being provided by the Insurers, and so found by the Verdict, they had fulfilled their Warranty, and so ought to recover. Ex parte quer.

That what was afterwards done by the Master of the Ship in coming out of the Harbour, ought not to prejudice the Plaintiff; for the Master is in Nature of a common Carrier to convey Goods from one Part to another; but as 'tis found by the Jury, he did not misbehave himself, for he came forth to meet his Conboy, and did endeavour it, but was hindered by the Weather.

These Words imply a mutual Covenant, and the rather because they come in the Conclusion of the Policy; but admitting it to be a Condition Precedent, the Plaintiff hath performed all he ought to do, for 'tis expressly found that the Ship did depart with Conboy.

Suppose the Words had been, Warranted to depart with Convoy, and so to continue to the End of the Voyage; (Dangers of the Seas only excepted) if the Ship should happen to be taken by the Enemy, that is a Danger at Sea; or if the Conboy leave her, being commanded another Way by the King; or if she is assaulted and will not fight, the Insurers shall lose nothing in either of these

these Cases: The Meaning of these Words are, That all necessary Care shall be taken to preserve the Ship, which was done by the Plaintiff, therefore he ought to recover.

Econtra. By these Words, the Ship ought to go all the Way with Conboy, and not only out of the Mouth of the River where there is no Danger, for that could never be the Meaning or Intention of the Parties, and that she should be left at Sea where there is Danger.

Now a Policy of Assurance is but a Parol-Contract, and must be construed according to the Minds of the Parties, and not according to the strict Sense of the Words.

Styl. 132.

As if a Man covenants to make such a Voyage, and to bear all Losses (excepting Perils at Sea) and the Ship was taken in the Voyage per quosdam ignotos homines & bellicosos, such taking by Pirates was held to be Perils of the Sea.

When a Person is obliged to secure a Thing under such Terms and Circumstances, the Manner of the Promise must be observed and pursued: As, if I promise to pay 5 l. to another, sending his Servant to me such a Day; if he doth not send his Servant, the Obligation ceases on my Part.

1 Roll. Abr.
450. placit. 9.

So if a Promise be made to deliver Goods in London, and for that Purpose they are put in a Boat, which is afterwards drowned, notwithstanding the Party used his Endeavour, that shall not discharge him, because he having undertaken to do the Thing on his Part, he ought to perform it.

It is found by the Jury that the Master of the Ship departed out of the Harbour, expecting to meet the Conboy, which must be to sail with her, and protect her the rest of the Voyage, or otherwise a Conboy will signify very little or nothing.

Here was a Severance by bad Weather: Now the Ship might have come up to the Conboy, or that to the Ship; but she did not stir out of Torbay till the Ship was taken, therefore the Insurers being to provide a Conboy, here is a Breach of the Agreement on their Side, which will hinder them from bringing this Action, especially since it is an entire Agreement, and no precedent Condition.

Curia. If the Insured have acted contrary to the Agreement, the Policy fails as much as if there had been a Deviation.

The Word Depart is only terminus a quo; if the Ship had departed from London, and came back again by Fraud, that had been no Departure within the Intention of this Agreement.

But upon this Departure (as 'tis found) the Voyage was begun with Conboy: They were afterwards separated by Strefs of Weather, and both endeaboured to save themselves, and afterwards to find out each other; and there being no Fraud found in the Master, Judgment was given for the Plaintiff, tho' it might have been otherwise, if the Conboy had run from the Ship, and by that Means he had been taken.

Rex & Regina *versus* Anonymus.

THE Defendant some Years since killed one J. S. and fled for the same; he appeared now, and was tried the last Assizes in H. and found guilty of Murder, and being brought to the Bar, he pleaded his Pardon.

In which Pardon the Verdict was inserted, then the Writ of Allowance was read, (which is the Warrant remaining in Court for the Judges to allow the Pardon) reciting the Pardon and Sureties found, according to the Statute of 10 Ed. 3. cap. 2.

And now several Reasons were offered by Counsel against the Allowance of the Pardon: For as the Law now stands, he said (with some Heat) That it was *Casus primæ impressionis*.

It appears by the very Pardon, That upon Not guilty pleaded, the Jury have found the Defendant Guilty of Murder, then comes the Pardon, and after the Recital of the Offence; 'tis *Sciatis*, &c. *quod nos pietate moti pardonavimus murdum*, &c.

Now the Kings of England have been always so far from pardoning of Murder by express Name, that formerly they did not so much as pardon Homicide, but in very soft and gentle Words, as, *Sectam pacis nostræ quæ ad nos pertinet de homicidiis*. 3 Inst. 235;

In the Register there are Forms of Writs of Allowance, where the King extends his Mercy to Murderers per infortunium, but no such Writ of Allowance for Murder; for 'tis a Crime for which no Mercy should be shewed; and this appears by the Coronation Oath, Part of which is, That the King will shew Mercy where it ought to be; which implies, that in some Cases Mercy ought not to be shewn.

And if in any Case, then certainly in this, for here is nothing pardoned, but what appears to be *ex malitia præcogitata*, which cries for Justice, and not for Mercy.

The ancient Laws were so tender of Pardons, even for Homicide, which is an Offence of far less Guilt, that the

Sta.

² E. 3. cap. 2. Statute of Ed. 3. was made to prohibit such Charters but where the King might grant them by his Oath; that is, where a Man was killed per infortunium, or in his own Defence.

⁴ E. 3. cap. 13. Staundf. placita Cor. n^o 100 b. 101 a.

Two Years afterwards in the fourth Year of Ed. 3. another Law was made, taking Notice that Pardons had been granted contrary to the former Act, and thereby it is declared, That no Man shall be pardoned but in Parliament.

And because Kings had been deceived by false Suggestions, and had thereupon dispensed with these Statutes with a Clause of Non obstante inserted in the Pardons; therefore the Statute of 27 Ed. 3. was made, which provides, That in the Pardon shall be contain'd the Names of those Persons at whose Suggestions it was obtained, which if found false, the Pardon is not to be allowed.

¹³ R. 2. cap. 1.

Afterwards upon the grievous Complaint of the Commons of England against such Pardons the Statute of R. 2. was made, by which 'tis expressly enacted, That all Pardons for Murder shall be disallowed.

But by the Iniquity of later Times, Non obstante's have been used to dispense with these Statutes which my Lord Coke calls excellent Laws for the Realm, but by this Means they are made ineffectual, tho' grounded upon the Law of God.

³ Infl. 236.

'Tis observed by that Judge. That before the making of that Statute of R. 2. a Pardon of felonies would discharge not only Treason, but Murder likewise; therefore it was enacted by that Law, That the Offence committed shall be specified in the Pardon of Murder by express Name; because if it should be specified as such in the Letters Patents, the Parliament did believe the King would never pardon it.

But notwithstanding the new Invention of Non obstante to those Statutes, my Ld. Rolle in giving Judgment in Ricabie's Case said, That the King could not dispense with this Statute, no more than he could with buying and selling of Offices contrary to the Statute of Ed. 6. because it concerneth Justice, and was made for the Advancement thereof, which the King hath promised to observe, and that such Manner of pardoning was contrary to the known and settled Practice for 206 Years, and never heard of before Spencers's Case, which was carried with a strong Hand, and pro hac vice tantum.

But admit the Law and Practice to be so formerly, yet now by the Statute of 1 Guilielmi, which is penned by way of Declaration, that pretended Power (as 'tis there called) of dispensing

penning with Laws, or the Execution thereof by Regal Authority, is declared illegal.

If therefore by this Law Non obstante's are taken away, Raft. Entr. 455, 456. no Body will affirm that this Pardon can be good without such Clause.

Curia. A general Non obstante without a particular Recital of the Crime for which the Party is convicted, is not good since the making the Statute of R. 2. But at the Common Law, both before and since that Statute, the King may pardon Murder with a special Recital of the fact, non obstante that or any other Statute. Sid. 336. Dudley's Case. 21 Jac. cap. 27.

For suppose a Bastard-Child should be born dead, and the Mother conceals it, and 'tis afterwards discovered that she had such a Child; if she cannot prove by one Witness that it was born dead, 'tis Murder in her by the Statute of King James; but it would be a very hard Case, if upon such Circumstances the King should not have a Power of pardoning.

The Statutes which have been cited, are only to prevent the frequency of Pardoning; they do not take away the King's Prerogative, but prescribe certain Forms that Charters of Pardon may not be so easily granted, and that by such Means the King may be apprised of his Grants; for before the making of those Statutes, the Parties got Inquisitions to find the fact Homicide, and thereupon got Pardons out of the Chancery, Ex merito Justitiæ, without applying themselves to the King; which was prevented in these Statutes.

Now what Necessity was there of such Regulations in the manner of pardoning, if at the Common Law the King had no Power to pardon Murder?

The Pardon was allowed.

Beak & al' versus Kent.

Trin. 3 Willielmi Rot. 357.

Indebitatus assumpsit brought against an Executor, &c. for 1 Show. 286.
Wares sold.

The Defendant pleaded several Judgments, &c. and that he had not Assets ultra.

The

The Plaintiff replied particularly to each Judgment, and that they were kept on foot by fraud.

The Defendant in his Rejoinder put all the Judgments together, and said they were not kept on foot by fraud.

2 Cro. 625.
1 Roll. Abr.
802.

And upon a Demurrer, the Question was, Whether he should have made several Rejoinders to all the Judgments in particular, and not have put them all together, like the Case of Warkhouse and Symonds, which was an Indebitatus assumpsit for fees.

The Defendant pleaded several Judgments, as here, &c. and the Plaintiff made the like Replication.

Then the Defendant rejoined and said, That the Judgments were all satisfied, and that he did not keep separalia judicia prædicta on foot by fraud (and had left out, nec aliquod eorum;) And upon a Demurrer Judgment was given for the Plaintiff in the Court of Common Pleas, which was affirmed upon a Writ of Error brought in B. R.

Curia. The Plaintiff need not aver in his Replication that every Judgment, but that separalia judicia prædicta, are kept on foot by fraud, which had been a good Averment, and then this Rejoinder had been likewise good.

If the Jury had found but one Judgment kept on foot by fraud, there must have been a Verdict for the Plaintiff, because sufficient Matter of the Issue would be then found for him: For 'tis enough if the Substance entitles the Plaintiff to an Action, and avoids the Defendant's Plea.

9 Cro. 84.

As in the Case of Robt and Andrews: Waste was brought against the Defendant for cutting of 20 Oaks; the Defendant ought to plead, That he did not cut the 20 Oaks or any of them; but if an Action of Debt had been brought on a Bond conditioned, that the Obligor shall not do Waste, and the Breach assigned, that he did cut 20 Oaks, 'tis sufficient to say that he did not cut the said 20 Oaks, modo & forma, &c. for if it be found that he cut one Oak, 'tis enough to forfeit the Obligation.

So in a Scire fac. upon a Judgment against Certenants, who pleaded several Pleas, and the Plaintiff replied, Quoad separalia placita, &c. without saying, Quoad placitum of the one, and so of the other particularly: for the Words Separalia placita shall refer to each Plea, reddendo singula singulis.

Rex & Regina *versus* Warrington & al.

An Information was brought against three for a Riot committed in Chester, one of them being then Sheriff of the City. 1 Salk. 152.
1 Show. 327.

The Venire fac. was directed to the other Sheriff, and upon a Motion it was objected, That it was not well awarded, for it ought to go to the Coroner.

It hath been so where the Sheriff was Plaintiff in an Action, and returned a Tales de circumstantibus, for the Array in that Case was quashed, and Process was awarded to the Coroner. 8 H. 6. 12.
Br. Abr. tit.
Process.
Placito 58.

The Reason seems to be, because the Sheriffs of a City or County are but one Officer, tho' they are distinct Persons; and when-ever any Writ is directed to them, it must be returned by both; for 'tis not sufficient that one should make the Return when the other is dead, because there are not those Sheriffs to whom the Writ was directed. 14 H. 4. 34.
Br. Abr. tit.
Retorne
placito 42.

Econtra. There being a Suggestion made upon the Roll, That one of the Sheriffs is a Party, the Venire fac. is well directed to the other.

Coroners of a City are but one Officer in Law, as well as Sheriffs, to execute Writs; but if one of them should be challenged in London, the Writ may be directed to the other.

Curia. If one should die, the Court can award no Process to the other.

If Conusance of Pleas be granted to be held before two Bailiffs of a Corporation, and an Action should be brought against one of them, that Person against whom 'tis so brought, shall not have Conusance of this Matter, for that should be to make him Judge in his own Cause.

But if one of them should be Plaintiff in an Action, the Plea shall not be removed for that Cause, for they being both Judges of Record by Virtue of a Grant from the King, one of them may therefore in such Case be both Judge and Party; but the Defendant may except against such Proceedings, and then the Plaintiff must stay till he is out of his Office. 2 H. 4. 4.
1 Rol. Abr.
492.

Cro. Car.
138.

Style 342.

22H.6.51.b.
placito 17.

'Tis customary in ancient Corporations where the Bailiffs are Judges, that they are Officers also as to executing of Process: There is a Case which seems to warrant the Objection now made, it was an Action brought in the City of Bristol for a Rescous; an Exception was taken in Arrest of Judgment, That (one of the Sheriffs being of Kin to the Plaintiff) the Venire fac. was awarded to the Coroners, when it ought to have been to the other Sheriff; but the Exception was not allowed, as appears by the Book, for Judgment was given there for the Plaintiff.

But in Easter Term following Judgment was given in this Case, That the Venire fac. was well awarded to the other Sheriff, and that it hath been formerly so resolved in B. R. between Sir Peter Rich and Sir Thomas Player.

As to the Objection, That they are but one Officer in Law, 'tis plainly otherwise; for where one is challenged, the other shall supply that Defect, and not the Coroner; for he is not the Person to execute the Process of this Court, but only where the proper Officer is wanting, which cannot be where there is one Sheriff.

Thomas *versus* Howel.

Trin. 3 Willielmi, Rot. 257.

1 Salk. 170.

E Broz to reverse a Judgment in Ejectment for the Plaintiff, upon a Special Verdict found at the Grand Sessions at Caermarthen, wherein the Case was thus:

Zachary Thomas being seized in Fee, &c. had Issue three Daughters,

Jane,	} And having several Estates in	} Lawhorne,	
Mary,			} Eglis,
Sarah.			
} three several Places, viz.			

He devised Lawhorne, which was the best Part of his Estate, to Jane and her Heirs, Upon Condition, That she at or before her Age of 21 Years do Consent to marry Theophilus Thomas, who was Nephew to the Testator.

Then he devised Eglis to Mary, and Kiffick to Sarah, in which Will there was a Proviso to this Effect:

Provided nevertheless, and my will is, That in case my Daughter Jane shall refuse to marry my Nephew Theophilus Thomas at or before she shall be of the Age of 21 Years, or in the mean time shall marry any other Person, That the Devise to her and Mary shall be void.

And then he devised Lawhorne to Mary his second Daughter and her Heirs, and Eglis to his eldest Daughter Jane, and so to his third Daughter severally, upon Condition that they marry the Nephew,

Then follows this Clause: But in case neither of my said Daughters marry my said Nephew, then also the Estates given to them in Lawhorne, shall be void, &c.

Then he devised Lawhorne to six Trustees, that they within nine Months after his Decease, should divide it equally amongst his three Daughters, or in such manner as the said Trustees should think fit.

The Jury found that the Testator died seised, &c. and that Jane entered upon Lawhorne, that Theophilus Thomas died before he was twelve Years old, and unmarried; That he did not require Jane in Marriage, and that she did not refuse to marry him; but at the Age of seventeen she married the Lessor of the Plaintiff.

Upon this Verdict, Judgment, was given below for the Plaintiff and Serjeant Pemberton and Mr. Finch (as it was said) having given their Opinions that the Estate of Jane was determined, therefore this Writ of Error was brought.

The Question was, What the Testator intended by this Devise, whether Jane should have the Estate, if she was never required, or refused to marry the Nephew? Or whether her Estate was determined if she did never marry him, as she did not?

It was agreed, That her Estate was lost by marrying another Person, and this was collected from the different penning of the Conditions; for Jane was not to have the Estate if she refused, &c. or if she married any other Person.

Then when he devised it to Mary the second Sister, he did not put it upon her Refusal, but generally upon her not marrying; so that this Meaning must be, If his two Daughters, contrary to his Direction, should not marry him, then their Estate should go to the youngest; and if none of them should marry him, then to be equally divided, &c.

He had no more Kindness for one Daughter than for the other: So that it appears throughout the Will, that he intended only the Advancement and Propagation of his own Name; and if that failed, then the Estate was to be divided.

Econtra. If this Construction should be made of the Will, then the youngest Daughter, to whom the least Share of the Estate was intended, will have the most; for she will have her own Part, which was never stirred by the Deceit, and a third of the other Part without any Default in her Sister; and the Case will be very hard upon the second Daughter, for according to this Interpretation, she must lose her Estate if she doth not marry the Nephew, though she is never asked, and never refused.

Neither was it the chief Intent of the Testator to keep the Land in his own Name, for then he would have given it to his Nephew in the first Place, upon whose Death the Probiso is determined, and all that comes after is made impossible.

His Meaning could not be to restrain his two Daughters from marrying other Men, if the Nephew should refuse them; so that the Words which follow, If she marry any other, must be intended, if she marry any other, so that thereby she made her self incapable to marry him, and the rather because the next Condition is, That if the second Daughter doth not marry him, &c. then, &c. but not if she marrieth another.

Suppose the Nephew had married the second Daughter after the first had given her Consent to marry him, the Estate of the eldest Sister should not be determined, because there was no Fault in her.

Curia. Three Judges for affirming the Judgment in Trinity Term following.

All Wills are to be expounded according to the Intent of the Testator collected out of the Words of the Will.

Now it plainly appears that the eldest should have Law-horne, if there was no Defect in giving her Consent to marry the Nephew, which by the Act of God was afterwards made impossible; and therefore she shall not be divested of her Estate, being no wilful Fault or Refusal in her.

Thus it will stand upon the Probiso, if there had been nothing farther added in the Will; and as to the Clause which follows, that makes no Alteration in this Case, because it re-
fers

fers to the same Matter, and being in a Will, shall not be construed or taken in a larger Sense, than the Probiso it self, and this is proved by the Authorities following.

A Man having Lands in three Places, devised all to his Son John in Fee; and if he died without Issue, then he devised his Lands in Ham to Henry his Nephew, and died. 2 Cro. 290.
Yelv. 209.
Moor 124.

John entered and made a Devise of the Lands, and died without Issue. It was adjudged, That this was no Countermand of the first Devise to John, quoad those Lands in Ham, but a Limitation by way of Remainder to Henry.

So where an Estate is given in a precedent Clause by Will, it shall not be altered by any subsequent Clause in the same Will. Cro. Car. 396.

But in Deeds it was admitted, That subsequent Clauses which are general, shall be governed by precedent Clauses which are more particular: As, if a Man maketh a Lease for Years, and then giveth a Bond with Condition, That if he suffer the Lessee quietly to enjoy without any Trouble from him, or any other Person, then the Obligation to be void, here the Words Suffer rules the whole Sense, and tho' a Stranger should enter, the Bond is not forfeited. 2 Roll. A2r. 396.

So in Debt upon a Bond entered into by the Bailiff of an Hundred, with Condition to make a Return of All Warrants, &c. he pleaded Performance, &c. The Plaintiff replied, That he being Sheriff, Process was directed to him to levy Issues, and that he made a Warrant to the Defendant, which he did not return: And upon a Demurrer the Replication was held ill, because he did not shew that the Issues were to be levied within the Hundred, &c. for tho' the Words in the Condition are general, viz. All Warrants; yet it shall be intended of such only which are to be executed within the Hundred. Alcyn 10.
2 Saund. 413.

But Justice Gregory was of a contrary Opinion, viz. That the Judgment below ought to be reversed, because Jane the eldest Daughter had not an absolute Estate in Fee, but determinable by way of Limitation; for there was no Clause in the Will, that either of his Daughters should have Lawhorne, but upon Condition that they marry the Nephew, which is a Limitation of their Estate; and to prove this, he cited this Case.

The

Cro. Eliz.

833.

1 Roll. Abr.

411.

Moor 644.

Vaugh. 271.

The Testator devised to his eldest Son certain Lands in Fee upon Condition, that if he did not pay the Legacies given by the Will, that then his youngest Son should have the Lands, &c. This was adjudged a future Devise to the second Son, and good in Case of Non-payment of the Legacies; and tho' it was void as to the eldest Son, it being no more than what the Law gives him, yet if it had been a good Devise to him, 'tis a Limitation of his Estate; and therefore if he doth not pay the Legacies, the second Son will have it.

D E

Term. Sancti Hill.

Anno 3 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1691.

Pitcher *versus* Tovey.

Mich. 3 Guilielmi, Rot. 61.

E Broz to reverse a Judgment given in the Common Pleas in an Action of Covenant, wherein the Plaintiff declared, That he was possessed of certain Houses in St. Martin's Lane for a certain Term of Years, and that he devised the said Houses to Richard Gill for 21 Years, under a certain Rent, which he covenanted to pay. That before the sealing of the Lease, it was endorsed for the Payment of 12 Bottles of Canary Wine every Year to Christian Tovey the Lessor, &c.

1 Salk. 81.
1 Show. 349.

That the Lessor entered, &c. and made his Will, and did thereby constitute Susan Gill sole Executrix thereof, and soon after died.

That the said Executrix proved the Will, and entered upon the Premises, and assigned the Term to the Defendant Thomas Pitcher, who entered and was possessed, &c.

That he the said Pitcher had not performed the Covenants, and assigned the Breach in Non-payment of 24 Bottles of Sack, which was due for two Years, and also for Arrear of Rent, after the Assignment made to him by the said Executrix Susan Gill.

The Defendant Thomas Pitcher pleaded, That before the said Wine and Rent became due, he assigned his Interest to James Mott,

and before that time the Lessor assigned the Reversion, yet at the End of the Term Possession must be delivered to the Assignee without giving Notice, that he is the Assignee.

So where the Assignee of part of a Term covenanted to repair, and the Assignor devised the Reversion, and died; the Devisee brought an Action of Covenant against the Assignee, and it was held good without giving Notice to the Devisee of the Reversion: Nay the Pleading of Notice is so far from being necessary in this case, that the Defendant might have pleaded Nil debet, and have given the Assignment in Evidence, which was done in the Common Pleas in the Case of Christy and Wilcox; and tho my Lord Chief Justice North directed the Jury to find the Assignment fraudulent, yet upon the special finding, the Court were of another Opinion when it was argued. Godb. 161.
162.
Trin. 30 Car.
2. Rot. 636.

There is a Case in Latch, where an Executor of a Lessee for Years assigned over his Term, and the Lessor brought an Action of Debt against the Executor for Rent arrear after the Assignment, who pleaded that he had assigned the Term, but did not shew that he had given Notice, &c. The Plea was held well enough, but the Plaintiff had Judgment, because the Privity of Contract did still remain between him and the Executor, who had no Power by any Act which he could do, to change or destroy the Action of the Lessor. Latch 260.
Noy 97.

But if the Lessee for Years himself had made such an Assignment, and died, that might have made some considerable Difference: For then possibly an Action of Debt would not have lain against his Executor, because that must be maintained against him upon the Privity of Contract, which is removed by the Assignment of the Testator. It might be well brought against the Lessee himself in his Life-time upon the Privity of Contract, and so is Walker's Case. 3 Rep.

2d Point. But here is neither the one or the other, and therefore if it should be necessary on the Part of the Defendant to plead that he gave Notice of the Assignment, yet the Plaintiff cannot have Judgment against this Defendant, because the Action will not lye; for it must be supported either upon a Privity of Contract or Estate: Now there can be no Privity of Contract pretended between them; for the Defendant is only an Assignee of an Executrix of a Term; and there can be no Privity in Law, for that only lasts so long as the Estate continues, and no longer.

L

And

Cro. Eliz.
555.

And therefore the Judgment in Overton and Sydall's Case was relied on in Point. It was Debt against an Executor of a Lessee for Years, after the Defendant had assigned the Term; and it was held that it would not lye, because it could not be brought against him upon the Contract of the Testator, to which he was neither party or privy; nor upon the Privy in Law, for then the Term must be still in him, which was gone by the Assignment; and so by Consequence the Action must fail, which is this very Case.

Another Objection was made, that the Action being brought as well upon the Covenant for the Bottles of Wine, as for Rent, and entire Damages given, 'tis naught; because the Wine arises in Covenant; 'tis a Reservation, and not properly a Rent, and so cannot be assigned to the Defendant who is a Stranger to this Covenant.

Econtra. It was agreed by the Counsel of the Plaintiff, that here was no Privy of Contract in this Case, but that there was a Privy of Estate remaining, notwithstanding the Assignment, which was not compleated till Notice.

If it should be otherwise, the Mischief would be very great; for against whom should the Lessor bring an Action? If against the Under-tenant he may be non-suited, unless he can prove the Assignment to him; and therefore in Judgment of Law the Privy must still continue, tho in rei veritate the Estate it self is assigned.

The Lessor has as much Right to his Rent, as a Patron hath to his Presentation: Now it will not be denied, that if there be a Deprivation by the Ordinary, the Patron must have Notice, otherwise the Bishop may take an Advantage of a Lapse by his own Act.

2 Cro. 432.

1 Bulst. 44.

Roll. Rep. 1.

P. 314.

1 Roll. Abr.

463.

2 E. 4. 3.

'Tis true, if I promise to pay to A. B. for Goods delivered, so much Money as C. D. sold the like Goods for at such a Market, and after this Agreement the Plaintiff declared, That C. D. sold for so much: The Action is well brought, without alledging that he gave Notice to the Defendant that C. D. sold for so much, quia constat de persona. But where the Person is uncertain, or where the Act is to be done by the Person to whom the Payment is to be made, there Notice is necessary: As, if I promise to pay a Man so much Money when he returns from London; there he ought to give me Notice of his Return, that being the Time of Payment.

In this Case, if the Plaintiff had accepted the Rent after the Assignment, yet the Defendant had not been discharged without Notice; so is Penant's Case in the third Report, where a Lease was made upon Condition, That the Lessee should not assign it without the Assent of the Lessor; he did assign it contrary to the Agreement; and the Lessor not having Notice, &c. accepted the Rent of the Lessee after the Assignment; but notwithstanding this Acceptance, he entered for Breach of the Condition; and it was adjudged lawful, because it being a collateral Condition, Notice is material; for otherwise it may be broken so secretly, that 'tis impossible for the Lessor to know it: And if Notice should not be necessary in such Case, then the Lessee may take Advantage of his own Fraud, which the Law will not permit.

The Reason given by my Lord Chief Justice Wray, in 3 Leon. 95. Gurney and Saer's Case, rules this at Bar; which was thus: A Man had a Reversionary Interest to a Term of Years after the Determination or Surrender of a Lease then in Being; they who had the present Interest, made a private Surrender, without giving Notice thereof to him in Reversion; and for that Reason it was adjudged, That it should not be prejudicial to him.

The Opinion of Justice Twysden, in the Case before mentioned, stands single against the other Judges, and the Reason by him given, why Notice is not necessary, is of very little Weight; 'tis because the Plaintiff may distrain, if he cannot tell against whom to bring an Action: But if he may have two Ways to recover his Rent, why should he be defeated of one?

But the Remedy, by way of Distress, may prove ineffectual; for the Term may be assigned to a Beggar, or to a Person who may suffer the Houses to remain empty, and then there will be nothing to distrain.

As to the last Objection, That by the Endorsement, the Payment of the Fine is no Rent, but a Reservation, &c.

'Tis not material whether 'tis a Reservation or not: For 'tis a Duty, and it arises by Reason of the Thing demised, and goes along with it; and as to this Purpose, 'tis like the Case where two Copartners made Partition, and one covenanted to acquit the other of a Suit, occasioned by the Land so divided: The Covenantor aliened, and it is the Opinion of my Ld. Coke, That the Alienor, who is a Stranger to the Covenant, shall maintain an Action against the Covenantor, because the Acquittal runs with the Land.

1 Inst. 385.

It must be admitted, That in Overton and Sydall's Case, there is a Judgment seemingly in Point against the now Plaintiff, that the Action doth not lye against an Executor of a Lessee for Years, after such Executor had assigned the Term, because there is neither privity of Contract or Estate remaining in him to support the Action.

Sid. 266.
In the Case
of *Hellier*
and *Casbard*.

But this hath been denied to be Law, because such Executor shall be still liable to the Contracts of his Testator, so long as he hath any Assets to satisfy them.

Judicium.

After two Arguments, Judgment was given in Easter Term following, for the Defendant in the original Action, and the Judgment in the Common Pleas reversed.

It was held, That the Assignee was chargeable by Reason of the Land, and when he had parted with his Interest, there could be no Reason given why he should be any longer liable, especially since the Executor of the Lessee is still bound to perform the Covenants in the Lease so long as he hath Assets, and that was the true Reason of the Judgment in *Hellier* and *Casbard's* Case, as hath been observed.

That of Kightly and Bulkly upon the Point of Notice, &c. was not adjudged upon much Debate; and therefore a Writ of Error was afterwards brought upon it in the Exchequer-Chamber; and my Lord Hale, who was then Chief Baron, and my Lord Chief Justice Bridgman were of the same Opinion with Justice Twysden, that Notice was not necessary.

2 Vent. 228.

The Pleadings in this Case you may see in Justice Ventris's Reports, and the Case put, but no Part of the Arguments on either Side.

Parker versus Harris.

Trin. 3 Guilielmi, Rot. 27.

3 Vent. 249,
270.
1 Salk. 262.

Error of a Judgment in the Common Pleas in an Action of Debt for Rent, wherein the Plaintiff Harris declared upon two Demises, viz. of one Messuage, being in & super acclivitatem de Hampstead Hill, Anglice, the Rise of Hampstead Hill, habendum for seven Years, paying 18 l. per Annum, &c. and upon another Demise at Will, paying after the Rate of 18 l. per Annum, during the Continuance of that Demise.

The

The Defendant pleaded in Bar, That tempore dimission. prædictarum, the Plaintiff nil habuit in tenementis, &c.

The Plaintiff replied, That before the Demises made by him to the Defendant, the Lord Wotton demised to the Plaintiff a Piece of Land, with an old House and Barn, being Parcel of the Premises, for forty Years; the said Lord Wotton, adtunc & ibidem plenam potestatem jus & titulum habent. so to demise it, &c. by Virtue whereof the Plaintiff was possessed, and made a Lease to the Defendant, modo & forma, &c.

To this Replication the Defendant demurred;

And an Exception was taken to it, That the Plaintiff ought to set forth what Estate the Lord Wotton had when he leased to the Plaintiff, and that plenam potestatem jus & titulum was not sufficient without shewing what Estate he had; and this seemed in the Court of Common Pleas to be a good Exception, it being upon a Demurrer.

Then it was objected against the Plea, That the Defendant had set forth, that tempore dimission. the Plaintiff nil habuit in tenementis; it should have been temporibus, because the Plaintiff had declared upon two Demises, and he might have a Title when one was let, tho' not when the other was demised; and this seemed to be a good Exception to the Bar, for that the Defendant ought to have pleaded distinctly to each Demise.

But then an Exception was taken to the Declaration, That there was no Place laid for the Premises demised: for in & super acclivitatem, &c. is only a Description of the Situation; and of this Opinion was the Chief Justice; but the other three Judges held, That the Venue should come out of Hampstead, which shall be taken for the Mill, and that as well as if it had been said apud acclivitatem; and so Judgment was given for the Plaintiff.

And now it was argued in B. R. That if Hampstead be presumed to be a Mill, 'tis but Part of it; and for that Reason the Venue is ill, for 'tis not good de Balliva, because 'tis uncertain in the Limits.

If it be intended to be lieu conus, then 'tis naught, if alleged to be out of the Mill or Parish; and for that Reason a Venire fac. de Lincoln's Inn, has been adjudged not good.

Then

Then the second Count is upon a Lease at Will, rendering secundum ratam, which is not a good Reservation, because it may be in Corn, or in any Thing satisfactory: Besides, an Action may be brought every Day or every Hour, there being no Time limited when the Rent shall be; it might have been good upon a Contract for Goods, because the Jury may judge of the Value, but not for Rent.

2 Cro. 312.
Yelv. 227.

And as to the Replication, the same Objection was made, as in the Common Pleas, that the Plaintiff ought to have shewed what Title my Lord Wotton had at the Time of the Demise, that the Court might judge whether he had a Power or not to lease: And for this there is a Judgment in Point, in Glass's Case; where the Replication was, That the Plaintiff habuit bonum & sufficien. statum, &c. and it was adjudged upon a Writ of Error after Verdict, That the Estate ought to be set forth: But the Plaintiff had Judgment, because aided by the Statute of Jeofailes, it being after Verdict.

2 Cro. 52.

Cro. Car.
138.

Econtra. The Replication is good in Substance, for when the Plaintiff intends to avoid the Bar, he needs not plead it so sufficiently, as if he had been to shew his own Title, like the Case of Lodge and Fry, where the Plaintiff in Bar to the Abowry, shewed, That the Land was Copyhold, grantable in Possession or Reversion for Life or in Fee, and that the Lord granted the Reversion to him after the Death of W. who was Tenant for Life in Possession: And upon a Demurrer, because the Plaintiff had not shewed the Beginning, or by whom W. had the Estate; yet Judgment was given for the Plaintiff, because this was but only a Conveyance to his Title, and not the Title it self.

17 Aff. 30.
6 H. 7. 3.
9 Ed. 4. 3.
placito 9.

Then as to the Objection, That there could not be a Venue from the Place where the Land doth lye, it being in & super acclivitatem de Hampstead Hill: It was answered, That this must necessarily be intended to be a Vill. Hamlet, or Lieu conus; if neither, then it may be a Lieu conus out of an Hamlet, which the Defendant ought to have pleaded in Abatement.

But the Venue must come from Hampstead, because 'tis said in & super acclivitatem de Hampstead: Now in and apud are of the same Signification; and 'tis admitted, that if it had been apud acclivitatem, &c. it had been good.

Lastly, The Payment secundum ratam, must be in Money and can be intended in no other thing, because 'tis in the Case of a Tenancy at Will.

The Reservation is good if it had been in an Assumpsit or Covenant, and it amounts to no more than a Contract between the Parties.

In the Case of Titus and Perkins a Custom was set forth to pay a fine, tantam denariorum summam quantam terræ valebant ^{3 Mod. 132.} per Annum tempore admissionis; and it was adjudged good, because it might be helped by an Averment that the Land was worth so much that Year.

So in Evidence to a Jury upon the Custom of a Manor, ^{2 Cro. 671.} that the Land was demisable, paying the treble Value of the Rent, for 21 Years: And if the Termor died within the Term, that his Heir should have it, paying one Year's Rent, as a fine certain; and if he assigned it, then the Assignee was to pay one Year's Value of the Rent; this seemed to be an uncertain Custom throughout, yet it was held good.

Services are of the same Nature with Things which are in Reuer, and those may be certain in an Incertainty; for a Man may hold of his Lord to shear all his Sheep depasturing within the Manor, which at first is very uncertain, because he may have more or less; but because 'tis referred to a certain Manor, therefore 'tis held that the Lord may distrain for such a Service, which he could not do if it was not certain. ^{1 Inst. 96.}

In this Case the Payment secundum ratam, &c. is no Part of the Thing demised, but Something out of it which may be reduced to a Certainty when Judgment is given by the Court for the Damages sustained by the Detainer of the Rent.

Curia. The Reservation ad ratam is not good, it being upon a Lease at Will, where the Time of Payment of the Rent should be very certain; for if the Tenant hold over a Day, he must pay the Rent of the next Quarter.

But Justice Dolben inclined, That it being uncertain how long the Tenant would continue in Possession, he being only Tenant at Will, this Reservation may be good.

As to the other Objections, it was held not to be material for the Plaintiff in his Replication to shew his Title, or what Estate he had in the Houses, upon the Reasons and Authorities alledged at the Bar.

And

Sid. 326.

And likewise the Court concurred in Opinion with the Judges of the Common Pleas upon the Place from whence the Venue should arise, which must be from Hampstead; for if it had been de vicineto Hampstead, then there could be no Objection to it.

But because the Reservation was held to be void, the Judgment in the Common Pleas was reversed in Michaelmas Term following.

Glover *versus* Cope.

Pasch. 3 Willielmi, Rot. 267.

3 Lev. 326.
1 Salk. 185.
1 Show. 184.

IN Covenant the Plaintiff declared, That the Manor of Hackney in the County of Middlesex was an antient Manor, whereof one Messuage with the Appurtenances in Meer-street is Copyhold of Inheritance.

That there is a Custom within the said Manor for every Customary Tenant thereof, being seised in fee of any Copyhold Lands or Tenements, to demise the same for 31 Years more or less without Licence, &c.

That on the 31st Day of December 19 Car. 2. Sir William Bolton being then Lord of the said Manor did grant the said Messuage, &c. to George Hockenhall and Mary his Wife, and to the Heirs of the said George, who was thereupon admitted.

That on the 20th Day of February, 1671. the said Hockenhall and his Wife by their Indenture did demise the said Messuage to the Defendant for 21 Years rendring Rent, in which Lease the Defendant covenanted to repair during the Term.

That by Virtue of the said Demise, the Defendant entred and was possessed, &c.

That Mary Hockenhall died, and afterwards, viz. on the 20th of January 1684. the said George Hockenhall granted the Reversion of the said Messuage, &c. to his Son George Hockenhall the Younger, and to his Heirs.

That afterwards, viz. on the 14th of August, 1 Jac. 2. the said George Hockenhall the Son was admitted Tenant, and the same Day surrendered the Premises to the Plaintiff Glover who was admitted, and now brought this Action against the Defendant for not repairing of the Premises.

The Defendant pleaded, That after the Lease made to him, and before the Reversion came to the Plaintiff, viz. July 24. Anno 28 Car. 2. he the said Defendant assigned the Messuage, &c. to Sarah Pikes, of which the Plaintiff had Notice, by Virtue whereof she entred and was possessed, & hoc, &c.

The Plaintiff demurred, and the Defendant joined in Demurrer.

The Case upon the Pleadings is shortly thus :

A Copyholder in Fee made a Lease of a Messuage for 21 Years, warranted by the Custom, &c. the Lessee covenanted to repair during the Term.

Afterwards the Lessor granted the Reversion to his Son, who surrendered to the Plaintiff, who brought an Action of Covenant against the Lessee for not repairing; and whether the Action would lye or not? was the principal Question.

The Doubt did arise upon the Tenure of the Messuage, which was Copyhold; for if it had been a Freehold, the Action might have been well brought by the Assignee of a Reversion against a Lessee for Years after he had assigned the Term, notwithstanding the Lessor or his Assigns had accepted the Rent from the Assignee of the Lessee, and this upon the general Words of the Statute of H. 8. which giveth the Grantees and Assignees of Reversions of Lands, Tenements, and other Hereditaments, the like Advantage against Lessees by Entry for Non-payment of Rent, as the Lessors or Grantors themselves might have. 32 H. 8. cap. 34.

Now, whether Copyhold Lands may be comprehended in these general Words? was the chief Question.

First, It was premised, That without the Aid of the Statute, a Grantor of a Reversion might bring an Action of Debt; for so was the Law before this Statute was made; 5 H. 7. 19. and it was grounded upon this Reason, That where-ever a Man was entitled to a Reversion, so that he had the Rent which is incident to it, and which is given by Law, there the Law did likewise create the Privilege on Purpose to maintain an Action of Debt for the Rent. 9 H. 6. 16.

Then two Questions were made,

(1.) Whether this Covenant runs with the Reversion? For if so, then the Plaintiff being a Grantor of a Reversion, may bring this Action at the Common Law.

M

(2.) If

(2.) If not, then, Whether the Assignee of a Reversion of a Copyhold is aided by the Statute of H. 8.?

As to the first Point, this Covenant extends to support the Thing demised: for 'tis to repair: 'tis appurtenant to it, and shall run with the Land, and will bind an Assignee of the Term, tho' he is not obliged by the express Covenant; for 'tis Parcel of the Demise and Contract, and had an Existence at the Time of the making of the Lease: And so is Spencer's Case.

4 Rep. 16.
Cro. Car.
137.

In Debt for Rent by an Assignee of a Reversion against the Assignee of the Term, he pleaded, That the Lessor did covenant with him, That if he should be disturbed in the Possession, &c. that then he should detain so much of the Rent as he should be forced to pay, &c. And he alledged, That so much had been levied upon him for Fines and Issues, which he withheld out of the Rent; and upon a Demurrer it was held, That he should have the Benefit of this Covenant, for it runs with the Land, and upon such a Covenant the Assignee of the Term might have detained the Rent at the Common Law.

The Objection, viz. That if this Covenant runs with the Land, then the Assignee, and not the Lessee, must be chargeable, is of no manner of Force; because the Lessee is bound by express Covenant to repair, and no Assignment of the Term, or Acceptance of the Rent by the Lessor can discharge him.

Cro. Car.
188, 580.

2 Cro. 522.

This is the express Resolution in several Cases; and if it should be objected, that in those Cases the Actions were brought by the Lessors themselves, and not by Grantees of the Reversion, then the Judgment of the Court in Brett and Cumberland's Case, will be a direct Answer to that Objection, which was shortly thus: The Lessee having covenanted to repair, assigned his Term; the Grantee of the Reversion in fee accepted the Rent of the Assignee, the Lessee died, leaving the Defendant his Executor, and the said Grantee brought an Action of Covenant against the Executor of the Lessee for not repairing after the Assignments both of the Reversion and the Term; and it was held, That it would lie upon the Statute, being a Covenant in fact, and running with the Land, and that no Assignment made by the first Lessee could discharge his Executors so long as they had Assets.

'Tis true, the Action could not be brought against them by Reason of any Prohibitory Contract, for there was none; but it may be brought upon the Covenant it self, so long as they had any of the Testator's Estate in their Hands.

And therefore if the Plaintiff in this Case should not be entitled to this Action at the Common Law, yet he is aided by the Statute notwithstanding he comes to his Estate by Surrender, because a Surrenderer is an Assignee within the Equity and meaning of the Statute, in order to maintain either an Action of Debt or Covenant.

It has been formerly held that a Surrenderer of a Copyholder in fee is not such an Assignee as is intended by this Statute in order to take advantage of a Condition broken, because he is in by the Custom and not by Law, and cannot be privy to the Lease made by the Surrenderer; and so is Beale and Brasier's Case. 2 Cro. 305.
Yel. 222.

But this was a Judgment without Argument, and only by two Judges, the rest being absent, so that 'tis not of that force as a Judgment given by the whole Court upon a solemn Debate.

It hath been held also that Copyhold Estates are not within the Statute De donis, &c. and yet they do entail those Estates notwithstanding that Judgment. Cro. Car. 44.

It cannot be denied but that such Estates were valuable in the Law long before the making of the Statute of H. 8. for Justice Littleton tells us the Opinion of two Chief Justices in the Reign of Ed. 4. was, That if such Tenants pay their Services and are turned out of the Land, they may have Actions of Trespass against the Lord; nay they may prescribe against him, by Reason that they have fixed and perdurable Estates. Lit. Sect. 77.

Now this Statute was made for a general Remedy to give Actions to recover Men's Right, and therefore Copyholds must be included, because they are not only valuable in the Law, but are a great part of the Tenure of the Nation. Kclw. 76, 77.

And as they have been valued before, so likewise they have been since the making of the Statute: For if a Copyholder for life makes a Lease for three Years generally, having Licence to make it for 3 Years, if he so long live: Now tho' the Licence is not pursued, yet the Lessee may maintain an Ejectment. Owen. 72.

So where Lessee for Years was Dominus pro tempore of a Manor, who took a Surrender, and his Estate was determined before Admittance, yet it shall be compellable to be done according to the Surrender. 1 Inst. 59. b.

The Seberance of the Inheritance of the Copyhold from the Manor will not destroy the Tenure it self, because the Estate of the Copyholder is established by Custom; and therefore 4 Rep. 24. b.

neither the Lord, or any claiming under him can turn out such a Tenant.

34 H. 8.
cap. 14.
13 Eliz.
cap. 7.
25th 43.

Particular Statutes by which the Lord may have any Prejudice as to fines or Amerciaments do not bind Copyhold Tenants.

As the Statute of H. 8. concerning Bankrupts did not extend to Copyhold, and therefore a subsequent Law was made to include them.

Owen. 37th
25th 43.
97.

Neither did the Statute of Recusancy extend to such Estates, and the Reason given is, because the Lord may thereby receive an Injury by the Loss of his Customs and Services.

But general Laws made for the Publick good, and where the Lords of Manors can have no Prejudice, are binding, and shall extend to Copyhold Lands, tho' they are not named in such Statutes.

3 Rep. 7.

As in Heydon's Case, viz. a Religious House granted a Copyhold for two Lives, & Anno 30 H. 8. demised the same to Heydon for 80 Years; the very next Year a Statute was made, by which it was enacted, That if any Religious House shall within ONE YEAR next before the first Day of that Parliament or afterwards lease or grant, &c. any Lands in which any Interest or Estate for Life or Years was then in being; that such Lease should be void.

9 Rep. 104.

Now the Grant of this Copyhold for two Lives in the Year before the Statute was made was adjudged an Interest, and within the general Words of the Act, and therefore the Lease to Heydon was void.

32 H. 8.
cap. 2.

By the Statute of Limitations 'tis enacted, That a Writ of Right shall not be maintained to any Lands, &c. or any farther Seisin alledged in the Ancestor, than for 60 Years next before the Teste of such Writ, which Words point only at an Interest at Common Law. and not by any Custom; and yet Copyhold Lands have been adjudged to be within that Act.

32 H. 8.
cap. 9.

So likewise by the Statute of Maintenance the buying any pretended Right or Title to any Manors, Lands or Tenements is prohibited, which Words have been adjudged to extend to a pretended Right to a Copyhold Estate, because the Statute was made for avoiding Maintenance in general, which Design would be lost if Copyholders Lands, which are a considerable part of the Kingdom, should be left out.

Now to enforce this Argument 'tis to be observed, that the two Statutes last mentioned were made in the same Year, and by the same Parliament, by which this Statute was

was made to enable Grantees of Reversions of Manors, Lands Tenements, and other Hereditaments to take advantage against Lessees; and if such Constructions have been made upon the general Words of these Statutes, what Reason can be given why the like should not be made in this Case?

Econtra. Mr. Roe argued to the contrary, That the Authorities cited for the Plaintiff are not applicable to the Case in Question.

And first as to those cited out of the Year-books, they are Actions of Debt for Rent, and are of a different Nature from those in Covenant which is a collateral Thing, and a Chose in Action, and will not follow the Reversion without the Help of the Statute.

So that if any Thing supports this Action of Covenant it must be the Statute, but 'tis not within the general Words or within the Meaning of that Law.

Nothing of Copyhold can be intended to fall under the general Words, viz. Manors, Lands, Tenements and other Hereditaments; for such are only known at the Common Law, and therefore can have no Reference to Copyhold Lands which are created by Custom, and are only Estates at the Will of the Lord.

This has been held to be the Sense and Meaning of those very Words in several Statutes of Jointures, Uses, and Partition.

So likewise upon the Statute of 11 H. 7. which makes ^{11 H. 7. cap. 20.} the Alienation of the Wife void, of any Estate which she hath in Dower, for Life, or in Tail jointly with her Husband, &c. in any Manors, Lands, Tenements, or other Hereditaments; the Alienation of a Copyhold Estate, which she had ^{1 Sid. 41. 73.} in Tail jointly with her Husband was adjudged good, and not within that Statute.

Upon the Statute of 13 Eliz. cap. 7. which empowers the Commissioners of Bankrupts to sell their Lands, &c. it hath ^{1 Leon. 98. Cro. Car. 24.} been held they could not sell Copyholds, if that Law had not given them Power by express Words, viz. to sell as well Copy as free Land.

So are several Acts of Parliament which are made to give Forfeitures of Lands, Tenements, or other Hereditaments, &c. which Words do not extend to Copyholds, but only to Inheritances at Common Law.

And the Reason is because Copyhold Lands at the Time of making this and other Acts, and long after, were in no Esteem of the Law; for the Tenants of those Lands held them in Villenage, or at best were but Tenants at Will, and so not within the Provision or Care of Acts of Parliament.

And

And even at this Day their Estates are held only at the Will of the Lord according to the Custom of the Manor: And in many Respects this Tenant hath a Dependence upon the Lord; for he can neither alien nor lease his Copyhold without Licence; and therefore when either is done, 'tis as well the Act of the Lord as of the Tenant.

Hob. 177.

Another Reason offered why this Action would not lie was, because the Lessee had not attorned to him in the Reversion, according to the Opinion of my Ld. Hobert in Swinerton's Case, where a Copyholder made a Lease for Years rendering Rent, and then he surrendered the Reversion to the Defendant, who was admitted, and in a Replevin he avowed for Rent-arrear, which (it was said) he could not do, or enter for a Condition broken, without the Attornment of the Lessee to him.

But this was not much insisted on because the Law seems to be otherwise; for the Estate of a Copyholder doth not pass by any Grant of the Reversion at the Common Law, to which an Attornment is necessary, but by Surrender and Admittance.

Curia. A Copyholder hath an Inheritance, tho' he hath it in the Poss, and his Estate is now fixed and established by the Custom; and therefore 'tis Reason to construe him to be within the Equity of this Statute, and the rather because of late he has been held to be within the Statute De donis, &c. And so without farther Argument Judgment was given for the Plaintiff.

Walwin *versus* Smith.

Trin. 3 Willicmi, Rot. 361.

1 Salk. 177.

A Question was moved, Whether a Discontinuance in an inferior Court is helped after Judgment by the Statute of Jeofails? And the Court was of Opinion that Discontinuance of Process or in Pleading was helped by the Statute; but where the Cause is discontinued and out of Court, as in the Beginning of this Reign for not holding Hillary Term, all Causes were then discontinued, which could not be aided by any Statute of Jeofails, without a particular Act of Parliament for reviving those Causes and Process.

Co. 8. 58.
2 Cro. 211.

In Beecher's Case after a Verdict for the Plaintiff, there being some Doubt whether the Writ was good or not, and the Plaintiff

that intending to bring a new Action, got leave to discontinue in which Case the Judgment should have been entered, Quod * querens nil capiat per breve suum sed sit in misericordia pro falso clamore suo & præd. defendens eat inde sine die.

But instead of such an Entry, it was, That the Plaintiff by his Attorney, Venit hic in Curia & fatetur se in Curia hic ulterius nolle proseguere. So Judgment was given, That the Defendant eat inde sine die, which amounts to a Retraxisit, and is a Bar to the same Action for ever, so long as that Judgment stands in force.

Whereupon a Writ of Error was brought, and it was shewed that there was a Discontinuance; for the Verdict was 2 Jacobi, and the Judgment was 4 Jacobi; and no Continuance from one Term to the other, which might have been aided by the Statute of Jeofailes, if the Judgment had been given upon the Verdict; but it was upon the Retraxisit, which is not within the Statute; and for this Reason that Judgment was reversed.

* Nota, So is the Entry after a Verdict upon Demurrer; but if upon a Non-suit, then tis in mi'a quia non prosecutus est breve suum.

2 Cro. 213.

D E

Termino Paschæ,

Anno 4 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1692.

Adams *versus* Tapling.

Adams's
Case.
Farrell. 17.

In Covenant the Breaches assigned were, That the Houses were not in Repair, that the Locks were taken away, and that the Hedges were broken down, and the Ditches unscoured.

The Defendant pleads an Agreement made between the Plaintiff and him, That he should employ a Workman three or four Days in and about the repairing of the House, which should be a sufficient Satisfaction, and that he had employed a Workman, &c.

Upon this Plea they were at Issue, and there was a Verdict for the Defendant.

And now it was moved in Arrest of Judgment, and the Exceptions taken were,

1. Where an Accord and Satisfaction is pleaded, it must be Real; but in this Case it was no more than the Defendant was obliged to do.

2. There are several Breaches assigned, and the Defendant has only answered to the Repairs of the House, and so 'tis a Discontinuance in Pleading, which is not aided by a Verdict.

3. The Satisfaction is uncertain, viz. to employ a Man to work three or four Days; and for these Reasons Judgment was stayed.

Curia. In Covenant where the Damages are uncertain, and to be recovered, as in this Case, a lesser Thing may be done in Satisfaction; and there Accord and Satisfaction is a good Plea.

But in an Action of Debt upon a Bond where the Sum to be paid is certain, there a lesser Sum cannot be paid in Satisfaction of a greater.

Bridges versus Saer.

TRESPASS for pounding of his Sheep; the Defendant justified the taking and pounding for Damage-fesant.

The Plaintiff in his Replication prescribed to have a Common for Sheep, and the Prescription being traversed, the Jury found that the Plaintiff had Common for Sheep, and also for Cows.

An Objection was made that this Verdict did not maintain this Prescription, because it was larger than it was pleaded; but it was adjudged for the Plaintiff.

Carter versus Horner.

AN Action on the Case was brought on a Wager, where 1 Show. 348. in the Plaintiff declared, That there was a Discourse between him and the Defendant concerning a Messuage in Cookham, whereof Edward Darling was seised in Fee, and likewise concerning a Will which the Defendant affirmed to be published by the said Edward Darling, by which he devised his Estate (having a Wife and four Children) in these Words, viz. All and singular the Rest, Residue and Remainder of my ESTATE, of what Kind, Nature, or Quality soever, whether Freehold or Copyhold, which I intend to surrender to the Use of my Will, Leases, Goods, Plate, Debts and Chattels, I give and devise to Elizabeth Darling my Wife, and to George, Edward, Elizabeth, and Mary Darling in such Manner and Form as herein-after is mentioned; that is to say, one Third Part to my Wife, the other two Thirds to my said Children, equally to be divided Share and Share alike.

The Testator farther devised, That the Share of George should be kept entire till he was of full Age, And if any happen to die before 21, then to the Survivor and equally to be divided.

Edward died, Elizabeth survived, and George died before 21.

The Question was, Whether Elizabeth the Mother had an Estate for Life or in Fee by Vertue of this Will?

Cro. Car.
447.
1 Roll. Abr.
834.

It was said she had an Estate in Fee upon this Difference, viz. If the Testator had been entitled to Lands in Fee, and likewise to mortgaged Lands not forfeited, and had devised his Lands in Fee to his Brother, and all the Rest of his Leases, Mortgages and Estates, Debts and Duties, &c. of which he was possessed, &c. there the Word Estate being put amongst Chattels shall only carry an Estate for Life, and the rather because of the Word possessed.

Style 281.
1 Mod. 100.

But where the Word Estate stands by it self, and is not mingled amongst personal Things: As for Instance, where a Man being seized in Fee devised his whole Estate, there the Word Estate extends to the Land, and the Devisee shall take it in Fee; for 'tis a Word which comprehends not only the Land it self, but all the Interest the Testator had in it.

Econtra. The Word Estate signifies the Land and not the Interest which the Testator had in it; and being in a Will, that Word must be construed according to the Common and known Acceptation of it, which imports the Land it self, and not the Estate which he had in the Land, and therefore an Estate for Life only passeth.

The Words which follow, viz, of what Nature, Kind, or Quality soever, are a farther Description of the Thing devised, which is the Land, and of what Tenure it may be; so that the Testator hath not left it to the general Construction what shall pass by the Word Estate alone.

3 Leon.
pl. 88.

Thus it is in a Grant: As if a Lease is made to A. Remainder to B. in Tail, Remainder to the right Heirs of B. who bargains and sells all his Estate to D. nothing passes to him but during the Life of the Grantor, whilst the Estate-tail is in Being.

'Tis true, by a Devise of the whole Estate, it hath been held that a Fee did pass, but it was upon a different Reason from the Case at Bar, for it was devised, paying Debts and Legacies, and it happened that the personal Estate was not sufficient to do either. Adjournatur.

Burton *versus* Woodward.

A Decla-
tion in E-
jectment.
1 Show.
368.

Warwic. ff.

Memorand. quod die
vene ris prox. post crastinum
sanctæ Trinitatis isto eodem
Termino coram Dno. Rege &
Domina Regina apud Westm.
venit Thomas Burton per Willi-
elmum Blencow Attorn. su-
um & protulit hic in Curia dict.
Dni. Regis & Domine Regine
tunc ibidem quandam billam
suam versus Robertum Wood-
ward Clericum in Custod' mar.
&c. de placito transgr. & ejection'
firmæ & sunt pleg. de
prof. scilicet Joh. Doe & Rich.
Roe quæ quidem billa sequi-
tur in hæc verba. Warwic. ff.
Thomas Burton queritur
de Roberto Woodward Clerico
in Custodia Mar. marefc. Do-
mini Regis & Domine Regine
coram ipsis Rege & Regina
existen' pro eo videlicet quod
cum quidam Edmundus Budd
Clericus decimo die Martii
Anno Regni Domini & Domi-
næ Willielmi & Mariæ nunc
Regis & Regine Angl. &c.
tertio apud Burton Dasset in
Com. præd. dimisisset conces-
sisset & ad firmam tradidisset
præfat. Thomæ unum messua-
gium cum pertin. scituat. jacen.
& existen' in Burton Dasset præd.
in Com. præd. habend. & tenend.
messuagium præd. cum pertin.
præfat. Thomæ & assign' suis a

festo Sancti Mich' Archangel'
tunc ult. præterit. usq; finem
& Terminum quinque Anno-
rum extunc prox. sequen' &
plenar. complend & finiend'
virtute cujus quidem dimissio-
nis idem Thomas in tenementa
præd. cum pertinen. intravit &
fuit inde possessionat. quousq;
præd. Robertus postea scilicet
eodem decimo die Martii An-
no tertio supradicto apud Bur-
ton Dasset præd. in Com. præd.
vi & armis &c. in messuagium
præd. cum pertin. in & super
possession. ipsius Thomæ inde
intravit & ipsum Thomam a
firma sua prædicta termino suo
prædicto inde nondum finito
ejecit expulit & amovit ip-
sumque Thomam sic inde e-
ject. expuls. & amor. a posses-
sione sua inde extratenuit & ad-
huc extratenet. Et alia enormia
ei ad tunc & ibidem intulit con-
tra pacem dict. Domini Regis
& Domine Regine nunc & ad
dampnum ipsius Thomæ de-
cem librar. Et inde producit
sectam, &c.

Et præd. Robertus per Caro-
lum Ballet Attorn. suum ven. *Not guil-
ty plead-
ea.*
& defend. vim & injur. quando,
&c. & dicit quod ipse non est
inde culpabilis. Et de hoc pon.
se super patriam & præd. Tho-
mas inde similiter &c. Ideo
ven. inde Jur. coram Domi-

The
Postea.

no Rege & Domina Regina apud Westm. die Mercurii prox. post tres septimanas Sanctæ Trinitatis, Et qui nec, &c. Ad recogn. &c. quia tam, &c. idem dies dat. est partibus prædict. ibidem, &c. postea continuat. inde processus inter partes præd. de placito præd. per Jur. posit. inter eas in respectum coram Domino Rege & Dna. Regina apud Westm. usq; diem veneris prox. post tres septimanas Sancti Michaelis ex tunc prox. sequen' nisi Justic. Domini Regis & Domina Regina ad Assisas in Com. præd. capiend. assign. prius die Lunæ decimo die Augusti apud Warr. in Com. præd. per formam statuti &c. ven. pro defectu Jur. &c. ad quem diem, coram Domino Rege & Domina Regina apud Westm. venit præd. Thomas per Attorn. suum præd. & præfat. Justic. ad Assisas coram quibus &c. mis. hic record. suum coram eis habit. in hæc verba Postea die & loco infracontent. coram Johanne Powell Mil. uno Justic. Dni. Regis & Domina Regina de Banco & Georgio Dodson Armig' eidem Johanni Powell & Nicholao Lechmere Mil. uno Baron. Scaccarii Dom' Reg. & Dom. Regina Justiciariis ipsorum Dni. Regis & Domina Regina ad Assisas in Com. Warr. capiend. assign. per formam statuti &c. hac vice associat præsentia præd. Nich.

Lechmere non expectat. virtute brevis eorundem Domini Regis & Dna. Regina de si non omnes &c. venerunt tam infra nominat. Tho. Burton quam infra script. Robertus Woodward per Attorn. suos infracontent. & Jur. Jurat. unde infra fit mentio exact. quidam eorum videlicet Georgius Warner Henr. Norton Job Everton Robertus Dodington Josephus Sherston Thomas Coles Guilielmus Chaplin Tho Thompson Georgius Cotterell Thomas Gardiner & Elias Wells ven. & in Jura ill. jurat. existunt & quia resid. Jur. ejusdem Jur. non comperuer. ideo al. de circumstan. per Vicecomitem Com. præd. ad hoc elect. ad requisition. præd. Thomæ Burton ac per mandat. Justic. præd. de novo apponitur cujus nomen pannello infra script affilatur secundum formam statuti. in hujusmodi casu edit. & provis. qui quidem Jur. sic de novo apposit. videlicet Robertus Onely exact. simil' ven. qui ad veritatem de infracontent. simul cum al. Jur. præd. prius impanellat. & jurat. dicend. electi triat, & jurat. dicunt super sacrament. suum quod **Re-** **roia** de Burton Dasset in Com. Warr' infra script. est & a tempore cujus contrar' memoria hominum non existit fuit impropriat. quodq; Vicaria Ecclesiæ de Burton Dasset præd. a toto tempore supradicto fuit

Si non
omnes

Tales.

&

& est Ecclesiasticum beneficium & dotata, quodque messuagium cum pertin. infracontent' est & infra script. decimo die Martii Anno tertio infra script. necnon a toto tempore supradicto fuit pertinen. ad vicariam præd. & parcell. possession. ejusdem vicariæ unde eadem vicaria ut prefertur dotata est & gavisum fore debet per Vicarios Vicariæ præd. pro tempore existen. quodq; decimo quarto die Februarii Anno Regni dicti D'ni Regis & Dnæ. Reginae nunc primo quidam Chamberlain Hamersley Clericus fuit vicarius vicariæ præd. ac vicarius ejusdem vicariæ continuavit & eandem vicariam habuit usque deprivationem suam pro causa inferius specificat. videlicet quousque vicaria præd. vacua devenit virtute cujusdam statuti in Parlamento dicti D'ni Regis & Dnæ. Reginae nunc apud Westm. in Com. Middlesex. Anno Regni eorundem D'ni Regis & Dnæ. Reginae nunc primo tent. de abrogation. Sacramentorum Primatiæ & Ligeantiæ Angl. **The Oaths of Supremacy and Allegiance**, & de appunctuand' alia sacramenta edit. & provis. quodque præd. Chamberlain Hamersley præd. decimo quarto die Februarii tunc primo supradicto & continue postea usq; deprivation. suam præd. fuit seisit. de præd. messuagio cum pertin' in Dominico suo ut de

feodo in jure vicariæ suæ præd. quousq; præd. Chamberlain Hamersley post editionem statuti præd. & ante primum diem Augusti Anno Dni. 1689. in statuto præd. mentionat. seu eodem primo die Augusti seu unquam postea hucusq; non præstitit sacramenta Anglice **did not take the Oaths**, per statut. illud appunctuat. fore præstand. per quod præd. Chamberlain Hamersley vigore statuti præd. de vicaria præd. ipso facto deprivat. fuit & vicaria illa vacua in lege devenit quodq; infra script. Edmundus Budd Clericus ad tunc existen. presbyter secundum leges & statut. hujus Regni Angliæ debite ordinat. post finem sex mensium secundum computation. viginti & octo dierum pro quolibet mense computat. post præd. primum diem Augusti prox. sequen. & ante finem sex mensium secundum Computation. Calendar. computat. Anglice **Calendar Months** post eundem primum diem Augusti prox. sequen. scilicet 29 die Januarii Anno primo supradicto ad vicariam præd. præsentat. institut. & induct. fuit & omnia quæ per leges & statut. hujus Regni Angl. requisit. vel necessar. fuer. ad ipsum perfectum incumben. dicæ vicariæ faciend' (si prædicta vicaria prædicto tempore presentation. institution. & induction. præd. vacua fuerit) debita

debita juris forma fecit & perimplevit qui quidem Edmundus Budd postea scilicet eodem vicesimo nono die Januarii in messuagium præd. cum pertin. intravit & fuit inde seisis prout lex postulat. Et sic inde seisis existens præd. Edmundus præd. decimo die Martii Anno tertio supradicto dimisit præd. Thomæ Burton Messuag. præd. cum pertin. habend. & occupand. messuagium præd. cum pertinen. præd. Thomæ & Assign. suis ab infrascript. festo Sancti Michaelis Archangeli tunc ult. præterit. pro & duran. infrascript. termino quinque Annorum extunc prox. sequen. plenar. complend. & finiend. quodq; idem Thomas Burton postea scilicet eodem decimo die Martii Anno tertio supradicto in messuagium præd. cum pertin. intravit & fuit inde possessionat. prout lex postulat quousq; præd. Robertus Woodward eodem decimo die Martii Anno tertio supradicto vi & armis in messuagium præd. cum pertin. super possession. præd. Thomæ Burton intravit & ipsum a firma sua infraspacificat. ejecit prout idem Thomas Burton interius versus eum queritur. Sed utrum super tota materia præd. superius in forma prædicta compert. vicaria prædicta tempore presentati-

on institution. & induction. præd. vacua fuit necne Jur. penitus ignorant & inde petunt advisament. & consideration. Justic. & Curia hic & si super tota materia præd. per Jur. præd. in forma præd. compert. videbitur eisd. Justic. & Cur. hic quod vicaria prædicta præd. tempore presentation. institution. & induction. præd. vacua fuit tunc iidem Jur. super sacrament. suum præd. dicunt quod præd. Robertus Woodward est culpabilis de transgr. & ejection. præd. prout præd. Thomas Burton interius versus eum queritur & assidunt dampna ipsius Thomæ occasione transgr. & ejection. præd. ultra mis. & custagia sua per ipsum circa sectam suam in hac parte opposit. ad duodecim denar. & promiss. & custag. ill. ad 53 s. & 4 d. & si super tota materia præd. per Jur. præd. in forma præd. compert. videbitur eisd. Justic. & Cur. hic quod vicaria præd. tempore præsentation. institution. & induction. præd. non vacua fuit tunc iidem Jur. super sacrament. suum præd. dicunt quod præd. Robertus Woodward non est culpabilis de transgr. & ejection. præd. prout præd. Robertus interius pro se placitando inde allegavit. Et quia &c.

Burton

Burton *versus* Woodward.

UPON a special Verdict in Ejectment the Case was thus: 1 Show. 368.
 The Vicaridge of Burton Dassett was a Vicaridge endowed, to which the Messuage now in Question did belong.

That on the 14 Day of February, 1 Willielmi, one Chamberlain Hamersly was Vicar thereof, who was deprived for not taking of the Oaths by a Statute made Anno primo of the King and Queen.

That the Lessor of the Plaintiff after six Lunary Months to be computed from the first Day of August, &c. was presented, instituted and inducted to the said Vicaridge; but whether it was void or not at the Time of such Presentation was the Question.

And this depended upon the Construction of a Paragraph of the Statute made for abrogating of the Oaths, and taking of new ones.

And be it enacted, &c. That if any Archbishop or Bishop or any other Person now having any Ecclesiastical Dignity, Benefice or Promotion, shall neglect or refuse to take the Oaths, &c. in such manner as is therein directed before the first Day of August 1689. every such Person and Persons so neglecting or refusing shall be, and is, and are hereby declared and adjudged to be suspended from the Execution of his or their Office, by the Space of six Months to be accounted from the first Day of August. And if the said Person, &c. so having neglected or refused shall not within the said six Months take the Oaths in such Manner, Court or Place, as they ought to have taken the same before the said 1st of August, then he, &c. shall be ipso facto deprived, &c.

Now if the six Months appointed by this Act shall be accounted Calendar Months; then the Plaintiff had no Title, because the Church was all that Time full of Hamersly.

It was argued for the Plaintiff that those shall be accounted Lunary Months; for in all Statutes where the Word Month is used the legal Computation shall be 28 Days.

As where an Information was brought for using of an unlawful Game 7 Months upon the Statute of 33 H. 8. it hath been held, That these Months shall be accounted by 28 Days to each Month. 2 Roll Abr: 521.
Dyer 218:
33 H. 8.
cap. 9.
Cro. Eliz: 835.
2 Inst.

So upon the Statute of Enrollments, by which 'tis enacted, That no Freehold or Inheritance shall pass but by Deed in writing, and enrolled within six Months after the Date thereof, there it shall be also accounted 28 Days,

In

2 Cro. 167.

In Like Manner, where a Leet is to be held within a Month after Easter and Michaelmas, that Month shall be likewise accounted 28 Days.

Econtra.

It was argued on the other Side, that Months generally speaking shall be accounted in the legal Construction 28 Days; but where an Act of Parliament doth relate to Laymen, it shall be construed according to the usual Account amongst them. viz. 28 Days.

And where it relates to Ecclesiastical Persons, as in this Case, it shall be according to their Computation.

'Tis true the former of these Cases usually happens, because there are more Laymen than Churchmen, and for this Reason and upon this distinction the Authorities cited on the other Side are Law.

Now here is an Act of Parliament relating only to Ecclesiastical Persons, by which Act a certain and determinate Time is limited for a Thing to be done, the Neglect whereof being penal, it shall be accounted according to their Months, and not by 28 Days.

2 Cro. 166.
Yel. 100. id.
6 Rep. 62.
Hob. 179.
Lit. Rep. 19.
2 Inst. 320.

13 H. 4.
cap. 7.
Dyer 142.
218.
Sid. 186.
Cro. Eliz.
227, 835.

As for instance in the Case of a Lapse, upon a Quare Impedit the six Months shall be accounted according to the Calendar: So upon the Statute 2 & 3 Ed. 6. cap. 13. which gives a Consultation if the Suggestion is not proved by two Witnesses within six Months next after the Prohibition granted: And it was never adjudged otherwise when the Thing related to Ecclesiastical Persons, and very often where it doth not concern them, as upon the Statute of H. 4. for suppressing Riots, which gives the Justices Authority to enquire of Riots within a Month after the Offenders are departed, &c. which shall be construed according to the Almanack Months, and not by 28 Days.

The very penning of this Act may be a good Inducement to shew that the Makers thereof were of this Opinion; for there is a Time given to all Ecclesiastical Persons to come in and take the Oaths, viz. before 1 Augusti, otherwise to be suspended: This is not so much a Punishment as an Admonition that they may keep their Dignities by a farther Compliance with the Law; then a Day is given which is a Day of Grace and Favour, to which a Penalty is annexed in Case of not complying; so that they shall have the longest Day to conform to this Law, and therefore the Construction of these Words shall be according to the Subject-matter, as if I am to pay Money on the first Day of Michaelmas

Michaelmas Term, it shall be paid the first Day in full Term, and not on the Essoin day which in legal Construction is the first Day of the Term. Adjournatur.

Knight *versus* Symms.

Ejectment for five Closes called Furlong containing 20 Acres of Arable and Pasture, to have and to hold the aforesaid Closes of Land, &c. Upon not Guilty pleaded the Plaintiff had a Verdict, and it was moved in Arrest of Judgment, for that he ought to demand so many Acres certain of Arable and so many of Pasture; and upon this very Exception a Judgment in Ejectment was reversed upon a Writ of Error brought in this Court, viz.

1 Salk. 254.
1 Show. 338.

The Plaintiff declared of a Messuage and 40 Acres of Land Meadow and Pasture thereunto belonging, and did not distinguish how much of each. Cro. Car. 573.

Savell's Case is express, that an Ejectment will not lie of a Close, but it must be of a certain Number of Acres, and the Nature of the Land must be particularly expressed. 11 Rep. 55.

It has been held that tho an Ejectment would not lie de uno clauso generally, because the Sheriff cannot tell of what to deliver Possession; yet where a Name is given to the Close without setting out the Number of Acres, 'tis well enough; and this was the Case of Jones and Howell in Cro Eliz. 235.

But in the same Book, and but two Years afterwards, it was ruled, that it would not lie of a third Part of a Close, tho a Name was given to it; and the Reason there given was, because an Ejectment is in Nature of a Præcipe, which must contain a certain Number of Acres. Cro. Eliz. 338.

But that which comes nearer to the Case now in Question is, That of Weeks and Sparrow, which was an Ejectment of two Closes called Gulwel, containing 3 Acres of Land, and did not shew what each Close contained, which was held good because the Quality of the Land was mentioned: But Justice Houghton was of another Opinion in that Case, which seems to be very reasonable; for if an Ejectment will not lie de uno Clauso, because of Incertainty; the Addition of these words which follow, viz. containing 3 Acres of Land, doth not make it more certain. 2 Cro. 435.

An Ejectment de castro villa & terris in Kilborough seems to be certain enough to describe the Thing demanded, in order to recover the Possession; but it was held to be too general, Yel. 118. Style 202.

and upon which no Haberi facias could be awarded, and therefore insufficient.

Serj. Tremaine contra: If there is such a Certainty of which the Sheriff may deliver Possession, 'tis well enough.

In Savel's Case there was neither the Quantity or Quality of the Land described; but here is both: That was an Ejectment of a Messuage and a Close called Dovecote Close containing 3 Acres, but doth not say whether Land, Meadow, or Pasture, &c.

Sid. 295.

This Action is in Nature of a Trespass, and therefore it will lie de uno pomario, or de una domo; but 'tis not doubted but it will lie de uno messuagio five tenemento, with this addition, viz. vocat. the Black Swan.

Curia. All the Certainty in this Case is the Addition of the Name called the Long Furlong; without those Words the other are very uncertain.

Now Names of Places are neither necessary or material in giving Possession, because they often change with the Proprietors; and the Sheriff must have sufficient Notice out of the Record it self to give Possession.

'Tis a Doubt whether an Ejectment will lie of a Close, giving it a Name without adding the Number or Quality of Acres; for if an Assize should be brought de uno caluso vocat. Black-acre, 'tis not good.

But here 'tis very uncertain, for the Plaintiff did not shew how many Acres of each in Pasture and Meadow; and then to say habendum clausa terræ is yet more uncertain; for tho the Word terra in legal Acceptation comprehends Arable Land, yet it doth not relate to Pasture; so nothing is said of that: And for those Uncertainties the Judgment was reversed after two Motions in Trinity Term following.

Loder *versus* Snowden.

In an Appeal of Murder the Writ was returnable a die Paschæ in quindecim dies but there being a Defect of Pledges, and that being returned by the Sheriff, the Appellant came into Court, and by his Counsel prayed that he might find Sureties, &c. 1 Salk. 64.

Quarto die post the Appellant appeared per Attornatum, and then the Defendant was arraigned.

Serj. Pemberton took Exceptions to the Declaration, and prayed that the Defendant might be discharged, because the Appellant appeared by Attorney, which in this Case could not be; and therefore it was no Appearance, and if so, 'tis a Discontinuance of the Suit upon Record. 2 Inst. 313.

The Court having taken time to consider, the Appellee was brought to the Bar a second Time, and then the Appellant was there in Person, and Sureties were taken, but the filing of the Warrant of Attorney was rejected; then the same Exception was moved as before, viz. That an Appeal being of a different Nature from other Actions, it ought to be in propria persona sua instanter appellat, and not per Attornatum; so that there being an Intermission, the whole is discontinued, and the Court gives no Day over.

'Tis true in an Appeal of Mayhem, where the Plaintiff did appear by Attorney (as in this Case) the Defendant prayed, That he might be demanded, which was done, and he not appearing in propria persona, was nonsuit. 2 Inst. 313.

But the Law is not that the Appellant shall be demanded of Necessity, because 'tis incumbent upon him to prosecute his Appeal; and if there is any Laches in him, then 'tis a Discontinuance; and if he is demanded at any Time, and doth not appear, the Court will then record the Nonsuit, for the Appellant must be all the Term in Court.

There is a Precedent in Rastall's Entries, where Judgment was given against the Widow for want of a Declaration the first Day of the Term; and therefore the Appellant having now failed in his Action there can be no Amendment, it being in an Appeal of Death, where no such Favour is given either by the Statute or Common Law. fol. 46. c. placit. 1.

Curia. Tho the Declaration is void in it self, yet 'tis not all one as if there had been no Declaration; 'tis only void so far as not to oblige the Defendant to make Answer to it; the Appeal may be arraigned again, especially the Appellant being the same Day in Court, and the whole Term shall be taken as one Day.

The Defendant upon the Arraignment should have prayed that the Plaintiff might be demanded, because he could not appear by Attorney, and then if he had not appeared in person he should be nonsuited.

He was not arraigned again, but the Secondary read the Record.

The Defendant prayed Oyer of the Writ and Return, which was returned, and read, and then by his Counsel moved that it might be entered as it was, and that Continuances from Time to Time might be entered in Regard he was going into the King's Service which was granted.

Then he pleaded a Conviction of Manslaughter, which was insisted on to be a good Plea in Bar to an Appeal of Murder, &c. and had his Clergy, &c. and prayed that his Plea might be allowed.

It was read by the Secondary.

3 Mod. 156. The Case of Goring and Deering was now cited, where it was the Opinion of 10 Judges, that a Man indicted for Murder, and found guilty of Manslaughter, the Court ought not to ask him what he had to say, &c. thereby to let him into the Benefit of his Clergy, and this for the Advantage of the Person who intends to bring an Appeal. Tamen quare, for the Law seems to be otherwise.

Rex versus Roberts.

1 Show. 389. Information for Extortion, setting forth, That there is a Common Passage and Ferry-boat, &c. for transporting of People and Cattle, &c. from such a Place, &c.

That the usual Rate for the Passage of a Man and a Horse was a Penny, and for a Score of Sheep 2d. &c.

That the Defendant being the Common Boatman, did carry at certain Times several Persons, and several Score of Sheep, and that during that Time he did extort de quibusdam ignotis,

ignotis, for the Use of the said Boat in passing over, &c. viz. pro transportatione cujuslibet equi 2d. & pro quibuscumque viginti ovibus Anglice Score of Sheep 4d. & sic secundam ratam, &c.

The Defendant was found guilty, and now several Exceptions were taken in Arrest of Judgment.

(1.) 'Tis not said from whom he extorted those Sums, but only de quibusdam ignotis.

(2.) No Time certain was mentioned when the Wrong was done.

(3.) 'Tis not said how many Score of Sheep were carried over, or that the Defendant carried any, but only that he took for every Score, &c.

Like Marrin van Henbeck's Case against whom an Information was brought upon the Statute of 18 H. 6. which requires that all Pipes of Wine shall be gauged, &c. before they are sold, and that so much of the Price as it wants in Measure shall be abated, on Pain to forfeit the Value to the King and Informer; and for that the Defendant had sold several Pipes of Wine, none of which contained 126 Gallons, and that he had not abated, &c. but did not shew how much was wanting in each Pipe, and for this Reason Judgment was against the Informer. 2 Leon. 38.
18 H. 6.
cap. 17.

2 Bull. 317

Econtra. 'Tis not material to name the Persons from whom the Defendant extorted Money, 'tis sufficient if the number was set forth: And therefore an Indictment that A. cum viginti septem aliis engrossed, &c. has been held good: Cro. Car.
380.

May tho' the Number should not be set forth, yet it seems well enough, because the Crime is the Taking, and when the Fact is found, 'tis not material from how many he took; the Verdict finds the Taking unlawfully, which could not be if the Cause had not been shewed.

The Law was very nice in Indictments till my Ld. Dyer's Time, but he held that an Indictment quod (the Defendant) felonice cepit bona cujusdam ignoti was sufficient; and the Reason given by the Book was, because the Goods may be carried into another County, and so not known who had the Property. Dyer 97

So here the People may live in remote Parts, who have been carried over the River, and the Informer may not know who they are, or whither they are gone.

As to the second Objection, That no certain Time is mentioned, &c. it was said that was not material after a Verdict: It might be a good Exception upon a Demurrer.

As for instance, the Statute of 3 Jac. 1. requires that a Popish Recusant convicted, who shall conform and go to Church, shall within the first Year after his Conformity, and every Year afterwards, receive the Sacrament, or otherwise for the said first Year he forfeits 20 l. the second Year 40 l. and every Year afterwards 60 l. and if doth receive it one Year and neglect the next Year, and so once a Year, then for every Year he is to forfeit 60 l.

2 Cro. 365.

An Information was brought upon this Statute, setting forth, That the Defendant seipsum conformavit, being a Recusant convicted in due Form of Law, but had not received the Sacrament for 3 Years, &c. Upon not guilty pleaded, the Informer had a Verdict, and it was held, That the Information was well enough, tho' no certain Time of the Conviction was set forth, nor before whom, &c. but the Court allowed it to be a good Exception upon a Demurrer.

Then as to the third Objection, 'tis not material to set forth the number of Sheep because the Taking is the Offence which is found by the Jury, as aforesaid; and the Informer being a Stranger, 'tis enough upon Evidence to shew the Fact, and not to set it forth particularly in the Information.

5 Ed. 6.
cap. 14.

And where a Fishmonger was indicted for engrossing Fish ea intentione to sell them again contra formam Statuti, &c. which is at unreasonable Prices.

Cro. Car.
314.

Now tho' a Fishmonger cannot be within that Statute, or said to be an Ingrosser, buying Fish only, which is his Trade so to do; yet if he Regrate, that is, buy Fish in a Market, and sell it again there or within 4 Miles at unreasonable Prices; he shall be within that Statute, being indicted, that he bought ea intentione ad revendendum contra formam Statuti, which must be that he engrossed, and did not sell for a reasonable Price; for if he did, it would have been given in Evidence to the Jury, but the Fact was otherwise proved to them, and therefore the certain Matter need not be set forth.

2 Cro. 240.

So an Information per viam corruptæ barganiæ & Cheviandiciæ fact. the Defendant did receive so much, &c. now tho' the Bargain was not certainly set forth, yet the Receipt being proved to the Jury, that was held sufficient.

As to Van Henbeck's Case it doth not appear by the Report, whether Judgment was given after Verdict, or upon a Demurrer; but be it as it will his Offence was against a Statute, but this is an Offence at the Common Law.

An Indictment against an Innholder upon the Statute ^{2 Cro. 609.} of 13 R. 2. and 4 H. 4. for that he existens communis stabularius vendidit diversis subditis infra domum mansionalem. He was found guilty, and it was moved in Arrest of Judgment that selling in his Mansion-house diversis subditis is no Offence if it was not in an Inn, and to his Guests; yet the Indictment was held good.

Curia. Every Taking is a several Offence and Extortion, and here are a whole Heap of Offences put together. It may be as well said that an Indictment for Battery will be good, setting forth that the Defendant beat so many of the King's Subjects between such a Day and such a Day.

The Cases cited by the Counsel for the Informer, will not warrant this Judgment.

As to that upon the Statute of Recusancy, 'tis very uncertain, because 'tis not said when the Defendant was convicted, or when he conformed, and therefore that was now held to be no Law.

The other Case of the Fishmonger was grounded upon the Purview of the Statute against forestalling and regrating; ea intentione ad revendam, is well enough, and the Defendant to excuse himself ought to have produced some Evidence at the Trial to bring himself within the proviso of the Act, viz. That he dwelled within a Mile of the Sea, and bought the fish to sell at reasonable Rates.

The Judgment was stayed.

Then a Motion was made, that the Defendant might be bound to the Good Behaviour, several Affidavits being produced that he continued his Extortion to that Time; but it was denied.

Barldale

Barfdale *versus* Drew.

Writ of Error upon a Judgment in the Common Pleas, and the Judgment was affirmed in B. R.

The Plaintiff brought a Certiorari to remove the Recognizance it self into this Court, which was given in C. B. upon the Allowance of the Writ of Error, so that he might sue out a Scire facias against the Bail.

But it was alledged, that B. R. could not grant such a Writ, because the Recognizance is a Record, which is not to be removed by Certiorari; for that only removes tenorem Recordi, and not the Record it self.

Dyer 275. a. A Certiorari like this was brought in Easter Term, 10 Eliz. to remove the Record of a Verdict out of the Common Pleas in order to bring an Attaint against the Jury; but it was disallowed for this Reason, viz. That no such Writ had ever been allowed; for the Clerk of the Treasury in the Common Pleas upon the Removal of the Record it self makes this Entry, viz. Quod Recordum removetur virtute brevis de certiorand. which removes only tenorem Recordi.

**F. N. B.
244. a.**

Now although Mr. Fitzherbet seems to be of another Opinion, where he says, That if a Man recover in an Assize of Novel disseisin before the Justices of Assize, and before Execution the Record is removed into the Chancery by Certiorari, he may then send it into the King's Bench, &c. but this must be intended where a Writ of Error is depending.

Sid. 213.

Econtra. Bail in inferior Courts is taken upon the Roll it self, and so part of the Record; and therefore when that is removed, the Recognizance must come with it; and upon the Affirming the Judgment, a Scire facias may be brought in B. R. against the Bail, who cannot plead Null tiel Record, because the Recognizance is well removed.

But in the Courts at Westminster the Recognizance is taken by it self, and is no Part of the Record upon the Roll; and therefore a Certiorari may be to remove it, tho' it cannot remove the Record it self: And it was allowed accordingly.

Chievly *versus* Bond.

Hill. 3 Willielmi, Rot. 307.

An Action on the Case was brought upon a Promise made by the Defendant to pay a Bill of Exchange drawn 14 Years since. 1 Show. 341.

The Defendant pleaded the Statute of Limitations, the Words of which Statute are, That all Actions of Trespass, &c. all Actions of Accompt, and upon the Case (other than such Actions which concern the Trade of Merchandize between Merchant and Merchant, their Factors or Servants) shall be brought, &c.

Plaintiff replied, that the Bill was a negotiating Bill, and that it was upon an Account between Merchants, &c.

The Defendant demurred, and had Judgment, because 2Saund. 124.
the Statute excepts only Accounts which are current between Merchants, and not any which are stated; for if an Action is brought against a Drawer for Value received, that is no Account current, but stated.

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Term. Sanct. Trin.

Anno 4 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1692.

Philips *versus* Bury.

Cases in Par-
liament. 35

MR. Colmer a fellow of Exeter College in Oxon, was expelled by M^r. Bury the Rector, &c. for Incontinency; the said M^r. Colmer appealed to the Bishop of Exeter, who is the Visitor of the College: He received the Appeal, and granted an Inhibition to any further Proceeding against the Appellant, and made an Order requiring the Rector and fellows to give an Account of their Proceedings, Sub poena juris & contemptus.

This Order was served upon the Rector and fellows, and then he sent a submissive Letter to the Bishop, and no farther Proceedings were had for four Months.

Afterwards M^r. Masters was commissioned to determine this Appeal in a formal Visitation, for which purpose a Citation was fixed on the Chapel-door of the College, requiring the Rector, &c. to appear on Saturday 23 Martii 1683.

He appeared accordingly, and tendered a Protestation, but the Commissary proceeded to give Sentence for M^r. Colmer to be restored, and awarded him 20 Marks for Costs.

Some time after this Sentence the Rector and fellows proceeded against M^r. Colmer (as pretended fellow) for another Act of Incontinency, who appealed again to the Bishop, and he received the Appeal a second Time, and resolved upon a Visitation in Person, and in Order thereunto he sent a Citation to the College, dated

May 16. 1690. and came himself to visit on the 16th of June following.

When he came the Chapel-doors were shut against him, then he appointed another Visitation on the 24th of July following, and coming thither the Rector and Fellows tendered a Protestation under the Common Seal, because by the Statutes of the College he was to visit but once in five Years, and having visited so lately by his Commissary he could not come again so soon.

Whereupon the Bishop suspended 5 of the 7 Senior Fellows (having suspended 11 in all) and restored Mr. Colmer, and proceeded to depose the Rector, and then 7 of the Senior Fellows, who were so after the Suspension of the other, chose Mr. Painter to be the Rector.

Mr. Bury continuing still in Possession, the Lessor of the Plaintiff brought an Ejectment of a Messuage in Oxon upon the Demise of William Painter, &c.

The Defendant pleaded, that the Messuage in the Declaration, &c. is the Freehold of the College, and that he being Rector thereof did enter in Right of the said College, &c. and traversed that the Lessor of the Plaintiff was Rector at the Time of the Demise, &c.

The Plaintiff replied, That the Messuage did belong to the College, and that he was Rector at the Time of the Lease made, & hoc petit quod inquiretur per patriam, and being at Issue, the Jury found a special Verdict, viz.

That Exeter College is a Body incorporate (founded by Walter Stapleton) by the Name of Rector and Scholars, &c. and that several good Laws were made by the said Founder for the better Government of the said College; and among the rest they find that every Scholar is enjoined to take an Oath before the Rector, &c. to observe the said Laws, and if he shall be expelled, never to appeal.

That the Bishop of Exeter for the Time being was by a Statute of the said College constituted the ordinary Visitor thereof, by which it was directed at what Time he should visit, viz. when required by the College, and de quinquennio in quinquennium semel per se vel Commissarium suum si non requisitus.

That at the Time of Mr. Colmer's Appeal the said Bishop was Visitor thereof. Then they find several Statutes made by the Founder, and amongst the rest the Statute de visitatione, as aforesaid.

They find another Statute, by which 'tis provided, That if the Bishop proceed to Deprive the Rector or Expel any Scholar, that if they cannot acquit themselves of the Charge against them, then amoveantur sine appellatione vel ulteriore remedio dummodo ad expulsionem scholaris concurrat consensus Rectoris & trium ex septem maxime senioribus tunc in Universitate presentibus; & si AD AMOTIONEM RECTORIS per hujusmodi EPISCOPI COMMISSARIUM etiam consentientibus quatuor ex septem maxime senioribus supradictis.

They find another Statute entitled Propter quas causas Rector ab officio privari debet, in which Statute several Causes are particularly named, and by which 'tis directed in what manner he shall be removed viz. He shall be admonished by the Sub-Rector and five Senior Fellows quietly to depart, which if he refuse (within a certain Time therein limited) then that the Bishop shall be acquainted with it, who is empowered to hear the Accusation, and if he find it true, to remove him from his Office, &c.

They find the Charter of Queen Elizabeth, by which it was incorporated de novo, and being a Hall before was then made a College.

They find that before the Lease made, James Colmer was convicted before the Rector of Incontinency, there being present also at the said Conviction, the Sub-Rector and five Senior Fellows of the College; that he was expelled and appealed to the Bishop, who appointed Dr. Masters his Commissary to hear and determine the same.

They find that the Commissary came to the College 22 Martii for that purpose, and did sit in the Chapel; That Dr. Colmore appeared before him, but that the Rector did not come, but made a Protestation in Writing, setting forth the Oath of a Scholar not to appeal against him for Expulsion; and therefore he denied the Authority of the Commissary to examine this Matter.

That notwithstanding this Protestation the Commissary did proceed to hear and determine the Fact ex parte, and restored Dr. Colmer.

That afterwards upon the second Removal of Colmer, the Bishop issued forth a Citation for a general Visitation on the 16th Day of June following; That he came to the College, and was hindered by the Porter from entering into the Chapel, which is locus visitationis; that the said Porter was then under the Power of the Rector, who departed re infecta.

That the Bishop summoned another Visitation on the 24th Day of July following, against which the Rector, &c. protested (being within the Time) insisting on the Statutes of the College, which he was bound by Oath to observe.

That the Bishop received this Protestation, quatenus de jure, and that the Rector disagreeing to this Visitation departed in Contempt of the Court; That he was summoned several Times to appear, and refusing, was pronounced contumax, and thereupon was deprived by the Consent of four of the seven Senior Fellows not suspended, who were then resident in the University, but who were not Seniors but by the Deprivation of Dr. Hern, and by the Suspension of five others.

That after this Sentence Dr. Painter the Lessor of the Plaintiff, was chosen Rector of the said College, &c. who made the Lease, &c.

This was the Substance of the special Verdict (which was very long) so far as necessary for the understanding these Points which were raised upon it, which were three.

(1.) Whether the local Statutes of the College did not take away that Power the Visitor had to give such a Sentence of Deprivation? If not,

(2.) Whether the Concurrence of any other Person was necessary to strengthen his Authority?

(3.) Whether this Sentence was examinable in any other Court?

As to the first it was agreed, That tho' by the Statutes of the College the Bishop had Power to make a formal Visitation only de quinquennio in quinquennium; yet these Words are not restrictive of his Power, but directive to him: for eo nomine he is a Visitor, he hath Power to come at any Time to hear Appeals, and redress upon Complaints made, tho' not to make a formal Visitation; and this is such a Power which cannot be restrained but by negative Words.

Dr. Masters came not as a Visitor, but for a particular purpose to hear and determine the Appeal of a single Fellow: He was not to visit the whole College, his Commission gave him no such Authority; neither can the coming of the Bishop himself on the 16th Day of June be called a Visitation. 'Tis probable he might have an Intention to visit, but was prevented by the Opposition then made to his Authority,

Authority, and it would be a very absurd Thing to say, that he being hindred did visit the College.

If so, then his coming again in July must be a Visitation warranted by the Laws of the Founder; for it was in general to hear Complaints, and to redress those Disorders which were made by the former Contumacy of the Rector and Fellows; and 'tis a vain Thing to suppose that the Intention of the Founder, or of his Laws was that such Disorders should not be examined till five Years afterwards.

2d Point. There is no Necessity of the Concurrence of any other Person to strengthen the Authority of the Bishop.

When a Visitor is appointed by the Founder, the corporate Body is subject to no other Person, 'tis to be governed by him according to the local Statutes made and published by the Founder; and therefore the Statute of 43 Eliz. which empowers Commissioners to visit Hospitals, doth provide against their Authority where any special Visitor is appointed by the Founder.

6 H. 7. 14.
F.N.B. 42.3.

In this Case the Bishop of Exeter is appointed by the Founder to be Visitor, he is to have the continual Inspection of this College; this is a Right granted to him without any Implication of Law; he hath propriam & non alienam jurisdictionem: For notwithstanding he is made by the Appointment of another, yet he hath an immediate Authority in his own Right quatenus Visitor, which is vested in him by the Law; he hath the same Power which was originally in the Founder, and if any other Person should endeavour to visit this College he might have a Prohibition.

Now a Visitor quatenus such hath always a sufficient Authority to deprive without the Concurrence of any other Person; and this Authority is not abridged by the local Statutes of this College; for tho' 'tis said, if the Bishop proceed to deprive the Rector or expel a Scholar, amoveantur, dummodo ad ejus expulsionem concurrat consensus Rectoris & trium ex septem senioribus; which must relate only to the Expulsion of a Scholar; for tho' the Rector is named, yet certainly this Clause cannot concern his Deprivation: for if it should, then his own Consent is required to his own Deprivation, which is very incongruous.

The next Clause is, si contra Rectorem ad amotionem per Episcopi Commissarium. &c. There 'tis true, the Consent of four of the Senior Fellows is requisite; but that is only to his Deprivation by the Commissary, which is not this Case; for he was deprived by the Visitor himself.

This appears yet more plain by the latter end of the same Clause, where 'tis said *Non negamus ei* (that is *Rectori*) *omnes exceptiones iustas, &c. ad dominum Episcopum*, which must be, that if he is deprived by the Commissary, he may appeal to the Bishop; which shews that the Power of the Commissary is restrained to the Consent of the four Senior fellows, but the Bishop himself by Virtue of that Power which is incident to him as Visitor, hath an absolute Authority to deprive without the Concurrence of those fellows.

This Authority is derived out of that Fulness of Power which the Founder had in himself; 'tis not like any Jurisdiction of the Courts at Law, nor to be guided or examined by their Rules; 'tis true, by this last Clause that original Power which the Bishop had quatenus Visitor to deprive, &c. may seem to be restrained, and that there ought to be a Depriuation by the Commissary first, and then an Appeal to the Bishop; for otherwise 'tis like an original Order made at a Sessions of the Peace to which any Statute directs an Appeal, and therefore void.

But the Cases are not parallel, because a Justice of Peace hath his Authority from particular Statutes, but a Visitor hath his Power by the Common Law; 'tis true he is named by the Founder, but he is vested with Power by the Law.

In the next Place, it would be very absurd to construe this local Statute to extend to the Depriuation of the Rector by the Commissary, and not by the Bishop, because it cannot be imagined that a Deputy can do what the Person from whom he derives his Authority cannot do; but if such Construction should be made, that there must be first a Depriuation by the Commissary, then if he should refuse to deprive or agree with the fellows against the Bishop, the Power of a Visitor would be of very little force.

But admitting such a Concurrence of the fellows necessary, 'tis sufficiently found by the Verdict, and set forth in the Pleadings that the Depriuation of the Rector was with the Consent of the seven Seniors then in the University, and the Statute doth not say that they shall be resident in the College, so that 'tis sufficient if they are the Seniors of such who are then present; and it doth not appear by the Verdict, that the five who are suspended, were after that Suspension present in the College; but on the Contrary, 'tis found they were called and did not appear.

3d Point. This Sentence is not examinable in any other Court.

This may be enforced from the Nature of Eleemosynary Corporations, and from many Authorities in the Books.

Now as to the Nature of such Corporations, they are by Law subject to a Visitor, the Extent of whose Power reaches as well to the Head as Members; 'tis true they have a Freehold, but tis sub modo.

The Charity was given by the Founder, and those who partake of it must receive it subject to such Limitations as he thought fit to impose upon them: He has appointed a Person to visit them who is Testatoris vices agere, he is made fidei Commissarium; and therefore the Sentence given by him shall be presumed to be the Sentence of the Founder himself, which cannot be thought unjust, especially by those to whom his Charity is extended; and if not unjust, then not to be examined elsewhere.

Then as to the Authorities in the Books, the constant Course hath been to deny a Mandamus when prayed to restore any person deprived or expelled from such a Corporation; and there is no Precedent in the old Books of any Restitution in such Case to a Monk, Prior, &c.

Dyer 209.

24 H. 8.
p. 12.

Dr. Coveney, President of Magdalen College, was deprived by the Bishop of Winton who is Visitor; he appealed to the Queen in Chancery, and it was resolved, That it did not lie: For it was not within the Statute of H. 8. because that directs to whom Appeals shall be made in Causes only of Spiritual Jurisdiction; but a College is not a spiritual Corporation, neither is the Act of Deprivation of spiritual Cognizance.

'Tis true the Book saith, that because there was no Appeal, ex hoc sequitur that the Party may have an Assize; but certainly that could never be the Opinion of my Lord Dyer, because the Governour of a College hath not sufficient Estate in Law to maintain an Assize: For he alone without the whole Body aggregate hath no sole Seisin or Right in any thing belonging to the Corporation; therefore that Sequel cannot be Law.

But admitting it to be the Opinion of the Chief Justice Dyer, it stands single by it self without any Authority to support it; 'tis no Judgment in Law, and my Lord Hale in Appleford's Case affirmed, That an Assize would not lie: And the Reason is plain, because where a proper Court hath

an Original Jurisdiction, no other Court will examine their Judgment after Sentence given; so is Bunting's Case, viz. If there is a Sentence in the Spiritual Court to dissolve a Marriage, tho' it be against the Reason of our Law, yet the Judges usually give Credit to it, because the Court which gave the Sentence had the proper and original Cognizance of the Matter. 4 Rep. 29. a. Moor. 169.

The same Reason is given in Kenn's Case which was cited as a Ground for the Judgment in Dr. Widdrington's Case, and likewise in the Case of Allen and Nash, where a spiritual Person was deprived by the High Commission-Court for a Contempt to the Ordinary generally, without shewing any particular Cause, and it was held good; for B. R. gives Credit to Sentences given by proper Judges. 7 Rep. 2 Rol. Abri. 219.

These are modern Authorities, but grounded upon former Resolutions in the Law; for in 8 Ed. 3. one Shirax was Warden of a lay Hospital, and deprived by the Visitor, the Archbishop being Patron put in Poplington, and Shirax as Warden brought an Assize. 8 Ed. 3. 69. b.

The Archbishop pleaded, nul tort, &c. and Poplington's Plea was, That the Demandant ought not sue as Warden for he was deprived by the Visitor; and it was the Opinion of Herle then Chief Justice of the Common Pleas, that whether the Deprivation was right or wrong, it was not examinable in that Court: For if he is deprived of his Name of Dignity by the Ordinary, he must recover it again before he shall sue by that Name. 13 Ass. placit. 18 Ass. placit. 29, 31. 10 Rep. 76. b.

The Court of Marshalsea is restrained to 3 sorts of Actions, viz. To Contracts and Covenants where both Parties are of the Household; to Trespasses when either Party is of the Household; and to other Trespasses within the Verge, when neither Plaintiff or Defendant is of the Household: An Action on the Case upon an Assumpsit was brought where neither of them were of the Household; the Plaintiff recovered, and the Bail of the Defendant was taken in Execution, who brought an Action of False Imprisonment, and had Judgment: Now this Matter was in a collateral Action, yet no Inference can be made from thence as to the Case at Barr; for the Proceedings in the Marshalsea were coram non iudice, and therefore examinable in a superior Court; but it doth not follow from thence that this Court should examine the Proceedings of a Visitor in a formal and lawful Visitation, when he hath a full and proper Jurisdiction to visit.

Neither is it any Objection to say, That the Visitor had a qualified Power, viz. to deprive for Contumacy, and for no other Cause: For if that is examinable here, then the Court takes upon them the Office of Visitor, which was never intended by the Founder.

It has been said, That the Rector hath a Freehold in his Office; and therefore ought to be protected by the Law, and to have the Privilege of applying himself to the King's Courts for Relief against any Injury done by a Visitor: But this Objection also fails, for his Freehold is gone by Deprivation, for that works an absolute Avoidance of it.

If it should be farther objected, That Disfranchisements of Corporations, Decrees made by Commissioners of Sewers, and Proceedings of Commissioners of Bankrupts are examinable in this Court, yet from none of these can it be inferred that the Proceedings before a Visitor shall be likewise examined here; because in those former Instances the Persons are not trusted with a Power of Judicature, what they do is extrajudicial; but in this Case the Visitor hath the sole and absolute Determining and Judging of the Actions of those who for the most part subsist by the Charity of the Founder; he is made a Judge by the Common Law, and tho' it should be said that the King cannot commission any one to exercise such a despoteck Power, yet the Common Law gives that Authority where the Consent of all are involved.

Pro Def.

Econtra. (1.) This Sentence of Deprivation is void.
(2.) If not, 'tis examinable in this Court.

'Tis void, because if a Founder appoints a Visitor and prescribes Rules to his Authority both as to Time, Person, and Place, and if that Power thus circumscribed is not exactly pursued in his Proceedings, and in all its Circumstances, 'tis not only Error, but all is coram non judice.

22 Ed, 4.
33. a.

Now the Visitor hath no Authority but what was given to him by the Founder, and his Power being restrained, if he exceeds, then he acts without Authority, and is in the same Case as if the Justices of the Common Pleas should receive Appeals of Murder or Felony, and attaint the Defendant: 'tis all void, for they have no such Authority by their Patent. Or, like a Sheriff holding his Turn other than within a Month after Michaelmas or Easter; all Indictments and Presentments taken before him are

coram

coram non iudice, because by the Statute of Ed. 3. he is enjoined to hold it within that Time. 13 Ed. 3. cap. 15.

There can be no Difference between these Instances and the Proceedings of a Visitor, who must be subject to these particular Rules and Orders, by which his Jurisdiction is established; and if it doth appear to this Court that he hath exceeded those Rules, then his Sentence will be pronounced to be void.

Another Thing to be observed is, That the Visitor had no Power to hold this Court either by Prescription or Charter; 'tis neither found so by the Verdict, or given to him; but if it should be admitted that he had Power by Charter, yet he could not give such a Sentence, because such a judicial Power could not be delegated by the Founder who was a private Person, and who could not erect such a Judicature; for what was done by him was only ministerial and extrajudicial; it was only a Power of annexing Laws and Rules of Government to those who partake of his Gift and Charity; but in Matters of Deprivation the Proceedings must be in the ordinary Course of Law.

Suppose a Man should give his Estate to particular Persons upon certain Trusts, &c. and if any Breach happens, that it should be examined by a particular Person, and no other; this is not good, and yet a Man hath as much Authority over his Land, as the Founder had over his Estate, who tho' he might give it to whom and upon what Conditions he thought convenient, yet it must be still subject to the Common Law, because it was so before any Disposition made by him, which is the Reason of the second Point.

(2.) That the Sentence of this Visitor may be examined in B. R. upon a collateral Action.

Because that Court hath a Superintendency over all such Proceedings, which may appear by many Instances of a higher Nature; where a Power is given by Act of Parliament, or by Letters Patents, even in such Cases their Proceedings are examinable here. 8 Rep. Dr. Bonham's Case. 11 Rep 93. 10 Rep. 141.

So are all Proceedings of Commissioners of Sewers who have a larger Power given them by the Statute of H. 8. to survey and amend, &c. at their Discretion and Wisdom; yet the Judges of the Common Law have interpreted that to be a legal Wisdom and Discretion. 23 H. 8. cap. 5. 5 Rep. Roor's Case.

So are also Proceedings of Commissioners upon the Statute of Bankrupts; for tho' they have an Authority under the Great Seal established by Act of Parliament, yet if they declare a Man a Bankrupt who is not so, he may traverse the Bankruptcy and try it here; and yet these Men are made by a higher Power than a Visitor is made; therefore his Proceedings may certainly be inquired into by this Court.

Now here if the Visitor had pursued the very Method prescribed by the Laws of the Founder, yet if the Recor is not guilty he can have no Relief but here; and the Rules to avoid Judgments in inferior Courts, either by Writ of Error or Attaint, are not applicable to a Sentence given by a Visitor.

4 Inst. 340.

'Tis true such Sentences are judicial, where the Foundation is spiritual, because the Ordinary is a spiritual Judge by the Law; but in a Lay Corporation 'tis otherwise, for their Acts are but ministerial; and from their Sentences an Appeal may be brought, which my Ld. Coke calls a natural Defence, and not to be taken away by any Power.

'Tis true also that such an Appeal was denied in Dr. Coveney's Case, because his Deposition was temporal; but the Book saith, ex hoc sequitur that an Assize will lie because he hath no other Remedy.

Fitz. Abr.
tit. Assize.
placit. 15c.

As to Shirax's Case in the Year-book of Ed. 3. 'tis an Authority for this very purpose; for that being a Lay Foundation, and he being deposed by the Ordinary, brought an Assize, and it was held good.

11 Rep. 99. b.

If a Corporation hath Power either by Charter or Prescription to disfranchise, and upon Complaint made, B. R. doth award a Writ to restore the Party, or New Cause, &c. if they return a sufficient Cause tho' false, there is an End of the Writ; but the Party hath an Action on the false Return; so that an oppressed Man is never left by the Law without proper Remedy.

'Tis denied that because the Founder is the Master of his own Liberality, he may prescribe what Rules he pleaseth to govern his Charity, and so may make the Sentence of a Visitor final; for an Appeal is a natural Remedy, and not to be taken away by any Power; it lies to this Court which is the supreme Visitor, and its Jurisdiction is not to be abridged, even by Act of Parliament without particular Words.

24 H. 8.
cap. 12.

The Statute of 24 H. 8. provides, That where a Cause is commenced before the Bishop or his Commissary; that an Appeal lies from him to the Archbishop of the Province within

within 15 Days after Sentence; and the Statute of 25 H. 8. gives Appeals from the Courts of Archbishops to the King in Chancery, which Court hath Power to issue a Commission under the Great Seal to certain Persons named by the King to hear the Appeal. and in both Cases their Sentences are made definitive; yet my Ld. Coke is of Opinion, that notwithstanding such a definitive Sentence, the King may grant a Commission of Review, because the Pope could do it by the Canon Law, and the Kings of England, have by subsequent Statutes the same Authority which the Pope had here. 25 H. 8. cap. 19.
4 Inst. 341.

Now tho' a Commission of Review is not properly an Appeal, yet 'tis a remedial Course of Proceeding, and 'tis not material by what Name an injured Person hath Remedy, so that he is relieved.

Many more Instances may be given to prove that the Party grieved may have a Remedy from a Sentence given by Persons who have lawful Authority so to do; as Justices of the Peace may make a Conviction of Force upon their View; they are made absolute Judges by the Statute, and may make Orders upon such Conviction; yet such Orders may be quashed in B. R. upon a Motion. Sid. 156.
Jones 171.

The Visitor is made a Judge by the Founder, but 'tis no Consequence from thence that his Judgment shall be final; for an Arbitrator is likewise made a Judge by the Party, and his Judgment is usually vacated in B. R. without a Writ of Error, and no more Respect ought to be had to the Judgments of either than to a By-Law.

But if such Sentences of Visitors should be definitive, and not to be examined elsewhere, then great part of the Nation in those Days would not have been subject to the Rules and Government of the Common Law; for the rich Men were got into Builds and Fraternities, the Men of Learning into Colleges and Halls, the poor Men into Hospitals, and those called Religious into Monasteries: Now in all these the Nation had a publick Interest, these were all Places and People of publick Use and concern, so that it would be very absurd to say that they shall be governed by particular Laws made amongst themselves, and exempted from the Power and Authority of the Common Law.

This Court takes Cognizance of the Extent of the Power of a Judge, Sheriff, or Executor, as soon as named; but it hath no Notion of a Visitor; 'tis a Word affected by the Canonists, who being made by the Founder, can have no Authority but what is given to him, and may be compared

4 Inst. 267.

red to an Officer constituted by Act of Parliament, who hath no other Power than is given him by the Act by which he is created, and therefore cannot prescribe as an Officer at the Common Law.

Then it was argued, That if the Visitor had such a definitive Power, yet here was no just Cause to support this Sentence, but a plain Defect, which made it void, because he had no Power at the Time of this Sentence given; for by the local Statutes he is to come but once in 5 Years, &c. Now this Limitation of Time is annexed to his Power by the same Law which made him Visitor.

His receiving the first Appeal made by Mr. Colmer, and his Commission thereupon granted to Dr. Masters was a Visitation; for he hath no Power over the College but as Visitor.

It hath been objected, that tho' this was in some Measure an Execution of his visitatorial Power, yet 'tis not such a Visitation which may restrain him to come again within 5 Years, because 'tis not a personal Visitation, but by his Commissary only; and it was made to a particular Purpose, viz. to hear an Appeal, which he hath always a constant Jurisdiction to do quatenus Visitor; so that it was not a general Authority given to him to exercise the whole Power of a Visitor, which is to enquire into all Abuses, &c.

But this is an Objection of little Force, because the coming of the Commissary is the coming of the Bishop himself; and tho' this Visitation was to a particular Purpose, yet there are no Words in the Statutes which give him Power to make a general Visitation; and if he is not restrained from coming oftner than once in 5 Years, then those Words *de quinquennio in quinquennium* signify nothing.

So that 'tis plain that the Bishop coming a second Time so soon after his Commissary made a Visitation, he administered an Oath which he could not do but as Visitor; and this seems yet more plain from the very Words of the Statute de Visitatione, which are, *Liceat Domino Episcopo, &c. quoties per Rectorem & in ejus absentia Subrectorem & quatuor alios ex septem maxime senioribus fuerit requisitus, necnon absque requisitione ulla de quinquennio in quinquennium semel ad dictum Collegium per se vel Commissarium accedere.* Now 'tis no Objection to say that he may come oftner, because there are no Negative Words of this Law to restrain him; for the first and last Words of this Sentence *liceat accedere* imply a negative, viz. That it shall be lawful for him to come then, and not as often as he will: and the Words *abque requisitione*

requisitione semel do farther imply, that he is not to come without Request but once in five Years.

Neither can it with any Colour of Reason be denied, That Mr. Colmer's Appeal did amount to a Visitation; for if the Hearing, Receiving and Adjudging Appeals is part of the Visitation Power, then the Hearing this Appeal is a visitatorial Act, upon which the Party Appellant was restored.

Again, tho a Visitor have Power by the Common Law to execute such things which belong to his Office quatenus Visitor, yet he must be subject to the Laws of the Founder; because the Authority which he hat his chiefly derived from him; no Part of his Power is supplied by the Common Law, for he is a Visitor secundum tenorem statutorum.

Now the Visitor hath executed that Power which he had not: for he is restrained by particular Words in the Statutes of the College to the Concurrence of four of the senior fellows, who have equal Power with him in the Depri- bation of a Rector, and there was no such Consent; for those who agreed with the Visitor were not Seniors, but by the Suspension of five who were their Seniors: Now a fellow of a College suspended remains a fellow still, his Interest ceases for a particular Time only, and may revive again; for he never ceases to be fellow but by De- priation, &c. But certainly a Suspension can with no Pretence be called a Depriation, because by the express Prohibition of these Statutes there must be the Consent of the Rector to the Depriation of a fellow, which was not in this Case.

If the Statutes should be otherwise construed so as to give Power to a Visitor to let in other fellows by the Sus- pension of their Seniors, this would be to overturn the Laws of the Founder who hath given the Rector a Power conjunctim with him.

To which it was answered, That there was the Concur- rence of four of such Seniors, which might very well satisfy the Law of the Founder: for tho' the four consenting were not maxime Seniores (as required by his Law) unless by the Suspension of the other five, and tho this is in the Case of a penal Law, yet they shall be construed to be such Seniors as are intended by the Founder to concur with the Visitor in Depriation; for penal Laws may be constru- ed according to Equity: As for Instance.

By the Statute of 28 H. 8. 'tis provided, That Offences committed upon the Sea within the Jurisdiction of the Admiral, shall be tried by Commission under the Great Seal

Dyer 211. b.

Seal directed to the Admiral and three or four Commissioners to be named by the LORD CHANCELLOR.

Now if such Commissioners are named by the Lord Keeper, yet the Commission is good, because the granting of such Commissions is good; the granting Commissions being a ministerial, and not a judicial Act.

32 H. 8.
cap. 1.
25 H. 8.
cap. 1.
1 Ed. 6.
cap. 12.

So by the Statutes of 28 H. 8. and 25 H. 8. Clergy is taken away from those who maliciously set Houses on Fire, and by the Statute of 1 Ed. 6. 'tis likewise taken away from several other Offenders, and allowed in all other Felonies, except such as are therein mentioned, and Burning of Houses is not there mentioned; then comes the subsequent Statute of 5 and 6 Ed. 6. reciting those three former Acts, and for that several Robberies and Felonies were committed since the making those Laws, &c. then it revives the Act of 25 H. 8. touching putting SUCH Offenders from their Clergy touching SUCH Offences, &c. Now the relative SUCH doth refer to the precedent Matter, and not only to Burglaries and Felonies named in that Act of Reviver; but to SUCH Offences in Mischief as those are; and therefore in Alexander Polter's Case it was held that Burning of Houses should not be exempt from Clergy.

11 Rep.

So in this Case tho there was not the Concurrence of four of the seven Senior Fellows, but by the Suspension of the Seniors, yet there was the Concurrence of SUCH Seniors, which was sufficient to fulfil the Meaning of the Founder's Law.

Resolutio
Curiz.

Afterwards in Trinity Term 6 Wilhelmi, by the Opinion of three Justices Judgment was given for the Defendant D^r. Bury, the Substance of whole Arguments, and the Reasons given for their Judgment were offered upon these two Heads.

1. That the Rector was not well deprived.
2. That this Court hath Power to examine the Matter in a Collateral Action.

4 Inst. 200.

And first, the Visitor hath no greater Power than that was given by the Founder; 'tis true, he is made a Judge, but he hath not an absolute Jurisdiction, but is subject to such Limitations and Restrictions which are imposed on him by the Laws of the Founder, one of which is, That the Rector is not to be deprived without the Consent of the four Senior Fellows resident in the University, which

which was not had in this Case, but by the Suspension of their Seniors.

Now a Fellow suspended remains Fellow still, for that Disability being removed, there is no Occasion of any Re-admission; neither is this Suspension a temporary Depri- bation, because that cannot be by the Constitutions of the College without the Consent of the Rector, which was never had.

In the next Place, the Bishop's coming on the 16th of June was a Visitation; he did an Act proper to the Office of a Visitor, he examined the Person about the Citation upon Oath, and this after a Protestation made by some of the Scholars, as coming so soon after his Commissary within time: Now he could not administer an Oath but as Visitor, and by the Laws of the College he could not visit, but once in five Years; therefore he was restrained to come again in July, and by consequence the Depri- bation of the Rector at that time must be void.

2. This may be examined in a Collateral Action in B. R.

For the College is a temporal Corporation, and the Depri- bation of the Head is a temporal Thing and cognizable at Law: The Wisdom whereof hath not trusted any one Court with the final Determination of Matters, tho' they arise within its Jurisdiction, but Writs of Error and Appeals may be brought to correct their Proceedings.

The Nullity of this Sentence of Depri- bation is no more than an erroneous Judgment at the Common Law, which may grieve the Party, but he is not without Remedy in another Court.

In 13 Assizarum placito 2. Parning, who was then a Justice of the Common Pleas, took this Difference, That where a Warden of a Chapel is depri- bated by one who had no Title, he may have an Assize to restore him by the Name of War- den; but where the Ordinary who had a Title doth depri- bate him, there he must first recover his Name of Dignity be- fore he can have an Assize.

And upon this Distinction all the Authorities will turn which were cited to exalt the Power of a Visitor: For all the Depri- bations made by Ecclesiastical Persons, viz. by Ordinaries, and those who have any spiritual Jurisdiction, and likewise formerly by the High Commission-Court, who acted by the Course of the Ecclesiastical Law, were Sentences given by spiritual Persons, whose Proceedings are different from those at the Common Law, and therefore can no more be avoided by a Civil Action, than by a Writ of Error.

R

And

Bro. Abr.
tit. nosme
placit. 37.

Moor 228;
Moor 781.
Jones 393.
5 Rep *Cap-
drie's Case.*
7 Rep. *Kenn's
Case.*
4 Rep *Bun-
sing's Case.*

And 'tis for this Reason, that when a Bishop acts as Ordinary, and exceeds his Jurisdiction, yet this Court must give Credit to his Sentence, because 'tis given by a proper Judge, and the Law hath allowed no other Remedy but an Appeal.

But in the Case of a Temporal or Lay-Corporation (as a College) their Proceedings must be always subject to the Determination of the Common Law; and therefore a wrongful Deprivation by a Visitor shall be examined here.

The Resolution in James Bagg's Case seems agreeable with this Opinion, where it was held, that if a Citizen is disfranchised, and brings a Writ of Restitution, if a sufficient Cause is returned (tho' false) Restitution shall not be awarded, but the Party is not without Remedy; for he may have a special Action on the Case.

If therefore a wrongful Disfranchisement or Deprivation by the Persons who have Authority in a Lay-Corporation may be avoided by a Collateral Action, a fortiori a void Deprivation may be examined in this Court.

Chief Justice, contra.

(1.) The first Question is, Whether the Sentence of Deprivation of the Rector by the Bishop as Visitor, hath made his Place void or not? And he held that it was made void by the Sentence.

(2.) Admitting the Visitor had Power to give such a Sentence, whether 'tis examinable in this Court? And he held it was not.

'Tis agreed, That the Bishop had Power to make a Visitation but once in five Years, unless required; but it was denied that the coming of Dr. Masters was a Visitation, who came for a Particular Purpose to hear a single Appeal.

Now tho' a Visitor may be restrained by particular Laws of the Founder to visit ex officio, but once in five Years; yet he hath a constant and standing Authority given to him by the Law of the Land to determine all Differences whatsoever, which may arise where he is Visitor in the mean Time, and from whose Sentence there is no Appeal.

1 Mod. 84.

This was the Opinion of my Ld. Chief Justice Hale in Daniel Appleford's Case, viz. That if there is a proper Jurisdiction in a local Visitor, and he hath determined the Matter, no Mandamus will lie; and therefore he denied it to restore a Fellow of a College, which is a Case in point.

To make this Matter a little more plain, viz. By the Law Diocesan Bishops can visit but once in three Years, yet their Courts are always open to hear and determine Offences.

Now in this Case if the coming of the Bishop in June was a Visitation, then he could not by the Laws of the College visit again ex officio in July; but that in June could not be a Visitation; for his Calling over a few Names, and Administering an Oath could not make it so, that being only to call them to an Account for Contumacy, in Order to punish them when he should make his formal Visitation in July following.

It has been urged, That the Depriuation was void, because without the Consent of four of the seven Senior Fellows; but their Consent is not necessary to the Depriuation of the Rector, even upon the Construction of the Statute de Visitatione: For the Bishop being ordinary Visitor of the College (quatenus such) he is invested with an ample Power to amove and depriue; and there are no Words in that Statute to qualify his Power.

The Words are, si ad privationem Rectoris aut expulsionem Scholaris, &c. dummodo ad ejus expulsionem concurrat consensus Rectoris, &c. So that Expulsion must be applied to a Scholar, and Depriuation to the Rector; for 'tis impossible those Words (ejus expulsionem) should refer to the Rector, for then he must consent to his own Expulsion.

By this Statute the Rector hath a Benefit which is denied to the Scholars, viz. an Appeal: for if he is depriued by the Commissary (which must be with Consent of four Senior Fellows) he may appeal to the Bishop as Visitor; if a Scholar is in fault, amoveantur sine ulla appellatione, so that the Power of the Commissary is abridged: But there is no Qualification of the Visitor's Power.

'Tis true the Suspension of a Fellow is no Impediment to his Consent, for he remains a Fellow; but his Consent being in no wise necessary, 'tis not material whether suspended or not.

2. This Matter of Depriuation is not examinable in this Court by a Collateral Action.

The Reason is obvious, because the Visitor is the proper Judge whose Sentence in this Case is definitive.

There are two Sorts of Corporations aggregate, one for the publick Administration of Justice, and the other for private Charities.

The first of these being of publick Government, is to be regulated and reformed by the Justice of Courts of Westminster.

Hob. 286.
1 Roll. Abr.
513.

ster-Hall, of these there is no Founder or Visitor; they subsist by Virtue of the King's Letters Patents, and the Law supplies all Defects in the Constitution; for tho' they may have no express Power granted to make Laws, yet such Power is incident to their Incorporation, and such Laws made by them are always subordinate to the Laws of the Land.

Now no Man can say, That a College is such a Corporation aggregate as has been described.

The second sort of Corporations are private, and the Founder and his Heirs are Visitors, and they shall always supply the defective Constitution of such a Corporation: This is to be governed by particular Laws of their own making, and the Laws of the Land seldom or never interfere; but where the Founder hath appointed no Visitor, and then it descends to his Heirs, who are to be perpetual Visitors of such Corporations which subsist by the Charity of their Ancestors, and those who are supported by it are to be regulated by particular Laws and Constitutions enjoined by the Founder of the Charity, and not by the Common Methods and Rules of Law.

116. *149* The Case of Shiraz in the Year-Book is not applicable to this Purpose; for he having a Donative, and being deprived by the Archbishop of York as Ordinary and Visitor, and another being collated, the Question was, Who was Visitor? And it appeared plainly it could not be the Archbishop, because the Matter was not spiritual; it was in the Case of a Lay Hospital which had no spiritual Possession; it was neither College or Convent, and for that Reason the Assize was held good, which probes nothing in the Case of a spiritual Corporation: For if the Deprivation had been by a proper Visitor, and one who had a lawful Jurisdiction, his Sentence would have been final, and no Assize could have been brought to examine it.

Raft. Entr. 1. Another Reason why this Sentence is definitive, and the Cause thereof not to be examined, appears in the Book of Entries, viz. in the Pleading of a Sentence of Deprivation there is no Necessity of shewing the Cause, for that is not traversable, which is a very good Argument that the Cause is not to be enquired into.

The Reason given why this Deprivation is examinable by a collateral Action is, because from such Sentence there lies no Appeal; and 'tis agreed on all sides, that 'tis not to be examined in this Court if an Appeal did lie.

But if this Reason fails in Cases of a like Nature, then it will be of little Force here.

Now an Appeal will not lie from a Sentence given by a proper Visitor, tho' there is no Cause expressed in such a Sentence, and this appears upon the Statute of 1 Eliz. by which the High Commission was erected, and Power given to the Queen and her Successors by Letters Patents to authorize Commissioners to exercise Ecclesiastical Jurisdiction; a Parson was deprived for Contumacy, not setting forth any particular Act, and the Sentence of the Commissioners was held good, as if given by the Ordinary himself, and not to be examined in a temporal Court, because the Proceeding was according to the Ecclesiastical Law against a spiritual Person.

Repealed,
17 Car. 1.
cap. 1.
2 Roll. Abr.
219.
Allen *versus*
Nash.

D^r. Coveney had no Remedy upon his Depriuation by the Bishop of Winton; for it was adjudged that no Appeal would lie, and the Inference in the Report, viz. ex hoc sequitur that an Assize will lie, cannot be Law, because the Head of a College cannot maintain an Assize in any Case whatsoever; for he hath no sole Seisin; he hath no Estate to support a real Action; he is only a visible Person of the Body aggregate, but hath not the least Title to the Rents and Profits of the College till after a Dividend made.

But notwithstanding Judgment was given for the Defendant by the Opinion of the other 3 Judges; which Judgment was reversed in the House of Peers in Hillary Term, 7 Willielmi Tertii Regis.

After this Reversal a Motion was made in B. R. that the Judgment in this Court being quod querens nil capiat per Billam, and a Writ of Error being brought upon that Judgment in Parliament, and the Judgment being there given quod judicium præd. revocetur & quod. præd. Richardus Philips restituatur, &c. That now the Plaintiff might have Judgment in B. R. to recover the Term, because the Record it self was always here, and only a Transcript thereof sent into the Parliament.

But it was objected, that the Court above should have given a new Judgment in Pursuance of what was done there; and therefore the Plaintiff must bring a new Action to recover the Term.

To which it was answered, That B. R. will give a new Judgment upon the Reasonableness of the Matter, and upon Consideration of several Precedents in the Exchequer-Chamber resembling this Case; for if the Defendant hath Judgment in B. R. which is afterwards reversed in the Exchequer-Chamber, and the Record certified here, the Court hath given a new Judgment; and this was done between

2 Cro. 206.
Yelv. 76.

Faldo and Ridge, viz. where in Trespass the Defendant pleaded

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ed in Bar, &c. the Plaintiff replied, &c. and upon a Demurrer to the Replication the Defendant had Judgment in B. R. which was reversed in the Exchequer-Chamber, *Et quod querens recuperet*, &c. and the Record being remanded, this very Court awarded a Writ of Enquiry, and upon the Return thereof a new Judgment, that the Plaintiff should recover his Damages, which was contrary to their former Judgment.

'Tis not necessary that the Court which reverseth a Judgment should give a new one, or the same which that Court should do who gave the first Judgment: As, if a Writ of False Judgment is brought in the Common Pleas, upon a Judgment given in a Court of Antient Demesne, and reversed, the Plaintiff shall not have Judgment there to recover Seisin of the Land, but shall be restored to his Action; upon which he shall have such Judgment as is usual to be given in the inferiour Court.

So if a Bill in Chancery is dismissed, and upon an Appeal to the Parliament that Dismission is reversed, the Court of Chancery thereupon always gives Relief suitable to the Judgment in Parliament; for upon such Appeals and Writs of Error brought they have no Rolls before them, but only *tenorem recordi*, upon which no Judgment can be properly given; and therefore if B. R. where the Record is, should not give Judgment, it would be a very imperfect Record, as standing without any Judgment, because by the Reversal the first Judgment is erroneous.

The Reversal also above would be invalidated by this Means: for there can be no Award of Execution there, and therefore 'tis most agreeable to Reason that the Court which sends forth the Execution should also give the Judgment.

Econtra. A new Judgment ought to be given by that Court, which reverseth the former; and 'tis no Argument to say that the Exchequer-Chamber doth not give new Judgments upon the Reversal of the old upon Demurrers; for that Court hath only a Power to affirm or reverse in such Cases; it cannot award a Writ of Enquiry of Damages, and that was the Reason of the new Judgment given in B. R. in Faldo and Ridge's Case after a Reversal in the Exchequer-Chamber; it was a Judgment given in B. R. upon a Demurrer.

But where Judgments are given in B. R. for Defendants, either in Ejectments or special Verdicts, and reversed in the Exchequer-Chamber, they may award a Judgment *Quod recuperare debeat*; and that was the Case of Sarsfield and Witherly.

Now the Judgment above is not so much; 'tis Quod iudicium præd' revocetur, &c. which is only a Stop to B. R. not to execute the former Judgment; and therefore cannot be construed or extended to give a new Judgment for the Defendant.

But admitting B. R. could give a new Judgment upon the Reversal above, and such as should have been given upon the original Record, yet that must be understood when the Judgment was given for the Defendant; but in this Case the Judgment for the Defendant is reversed.

Besides, the Authority of the Exchequer-Chamber is established by Act of Parliament, and limited to particular Errors of Judgments in B. R. which Judgments they must either affirm or reverse by the express Direction of the Statute, which enacts, That after such Affirming or Reversal the Record must be brought back again into B. R. that farther Proceedings may be had thereon, as well for Execution or otherwise; so that these Cases do not resemble this.

It has been said that the Parliament seldom gives any new Judgment, but only reverseth or affirmeth the Judgment below: But in the Case of Noel and Nelson, they did more than affirm the Judgment below, for they gave an Award of Execution and Costs for Delay upon the Writ of Error, and this may be very well done; for after the Chief Justice is commanded by the Writ of Error to send the Record to the King in Parliament, that the Proceedings below may be examined; then follow these Words, *Ut inspectis Recordis & processu prædictis ulterius inde de assensu Dominorum Spiritualium & temporalium in eodem Parlamento existen', &c. fuerit faciend.* which import that something else may be done, besides Reversing or Affirming the Judgment.

'Tis plain that Judgments have been given by Superior Courts upon Reversals, and sent down to the Courts below to execute: As, Error was brought in B. R. upon a Judgment in Ireland in Ejectment, where it was given for the Defendant and reversed here, and the Judgment was, *Quod querens recuperet Terminum*; and because by the Writ of Error, the Record it self was removed, and must therefore remain as a Record here after the Reversal, therefore B. R. did make a Mandate to the Chief Justice there to see Execution done.

But at another Day the Chief Justice delibered the Opinion of the Court, That they had executed their Authority by giving the first Judgment, and that there was no Precedent of B. R. giving a new Judgment after a new Reversal above: Where

27 Eliz.
cap. 8.

2 Saund. 225.

Whereupon the Remittitur, by which the Record is sent back to B. R. being not entred, the Court of Parliament was moved upon this Matter, and a new Judgment was added, that the Plaintiff recuperet Terminum suum præd', &c.

Russel's Case.

In a Prohibition to the Court of Honour held before the Earl Marshal upon a Libel there, setting forth, that there are three Kings at Arms, Garter, Clarencieux, and Norroy, and six Heralds skilful in Descents, Pedigrees, and Arms, to whose Offices it doth belong to marshal Funerals of great Persons at Request, &c. and that Russel and others had encroached upon their respective Offices by taking upon them to paint Arms, and marshal Funerals, &c.

The Defendant suggested the Statute of Magna Charta, viz. that no Man shall be disseised of his Liberties and free Customs, but by Judgment of his Peers, &c.

The Counsel against the Prohibition insisted that it would not lye to this Court of Honour, 'tis a Court by Prescription for Degrees of Honour, and the Heralds there proceed according to antient Customs, and being skilful in Descents and Pedigrees, do at the Request of several Persons marshal Funerals; and if ignorant Men should be suffered to attempt Things of this Nature, great Confusions would follow amongst noble Families.

Sid. 355.

They have as absolute a Determination in Matters of Honour, Pedigrees, Descents and Armories, as the Chancery hath in Matters of Equity, and no Prohibition was ever yet granted to a Court of Equity.

13 R. 2.
cap. 2.

This being a Court of great Antiquity hath endeavoured several Times to extend its Jurisdiction; and therefore several Acts of Parliament have been made to restrain them in their proper Limits, but Care was always taken to preserve their Rights.

By the Statute of 13 R. 2. the Authority of the Earl Marshal is declared, and a Remedy is given, where 'tis abused; but 'tis not by way of Prohibition by the Courts at Law, but by a Privy Seal from the King directed to the Earl Marshal not to proceed where he has no Authority: And for these Reasons it was prayed that no Prohibition might be granted,

Econtra. It was admitted that the Court of Honour hath a Jurisdiction to marshal Arms, but the Plaintiff in the Prohibition had not offended against that Court, for he had all his Escutcheons from the Herald; and as to marshalling Funerals, there are no negative Words in the Statute of R. 2. to restrain him; neither have the Herald any such Power by the original Patent, by which they are incorporated; they may as well complain against every Upholster who hangs a Room with Mourning, and against every Parish-Clerk who assists at Funerals, as against the Plaintiff in this Case; therefore they ought to be prohibited.

Curia. Upon the Matter set forth in the Libel they might maintain an Action on the Case; for if true, it is a Wrong done to their Possessions by doing such Things which belonged to their respective Offices.

Here is no Complaint of any Thing done against the Rules of Honour; and therefore this Matter cannot be determined, unless a Prohibition is granted, and the other Side demurr to the Suggestion.

Many Prohibitions have been granted in Cases of like Nature, as to the Dutchy-Court in Matters of Equity; and so a Prohibition was granted in this Case.

Culliford *versus* Blandford.

DE B C upon the Statute 23 H. 6. against the Mayor ^{6 Mod. 219.} of Dorchester for a false Return of a Burgess to Par- ^{23 H. 6.} liament; by which Statute the Penalty of 40 l. is given ^{cap. 15.} to the King, and 40. l. to the Burgess chosen, and not returned, so as he sue for the same within three Months after the beginning of the Session of the said Parliament, or to any Person, who in Default of him so chosen, shall sue for the same.

The Plaintiff was a Stranger, who after the three Months, and before the End of one whole Year, sued out a *Latus* against the Defendant; but this was within a Year after the Offence committed.

(1.) The Question was, Whether the Plaintiff was a common Informer, and so ought by the Statute 31 ^{13 Eliz.} Eliz. ^{cap. 5.} to bring his Action within a Year after the Offence? In the Preamble of that Statute 'tis said, That no Person other
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than the Party grieved, shall be received to inform upon a penal Statute, and then it is enacted, That where a Forfeiture is given to the King only, the Action shall be brought within two Years after the Offence; but if it be to the King and Prosecutor, then it must be within a Year.

(2.) If the Plaintiff shall be taken to be a common Informer, then whether the Suing out this Latitat is a Commencement of the Action?

Justice Eyre and Gregory held the Affirmative in both Points; but they insisted chiefly on the first Point, That the Plaintiff is no common Informer, because the Penalty was given to the Prosecutor, and no Time limited by this Statute when he should commence his Action. He stands now in the Place of the Party grieved, who did not sue within the three Months limited by the Act, and no Body will say that he is a common Informer.

The other two Judges doubted of this Point, but were divided upon the second, viz.

Justice Dolben was of Opinion, that the suing out of the Latitat within the Year, was a good Commencement of the Suit, and sufficient to avoid the Statute.

But the Chief Justice held, That a Penalty being given to the King as well as to the Prosecutor, if he had brought his Action for the whole 80 l. tam pro Domino Rege quam pro seipso, he had been within the Statute of 31 Eliz. and a common Informer, but here the Action was brought only for one 40 l. which makes some Alteration.

But as to the second Point, A Latitat was never yet construed to extend to a Statute where a Penalty is given to the Prosecutor, and therefore cannot be a Commencement for a Suit upon a penal Law.

'Tis otherwise where the Party is limited and barred from his Right by any Statute for not prosecuting in Time; therefore if the first Point is not for him, the last is against him: But yet the Plaintiff had Judgment.

Smith *versus* Milford.

UPON a special Verdict in Ejectment the Case happened to be thus, viz. 1 Lutw. 96:
1 Vent. 66.

John Dalacourt being seised in Fee of the Lands in question, did by Indenture bearing Date the fifth of June, 17 Car. 1. and made between him of the one Part, and John Perenchard and John Cadidge of the other Part, in Consideration of a Marriage then intended to be had between George his second Son, with Mary Perenchard, and in Consideration of a Portion of 200 l. &c. and for the settling his Land upon the Trusts therein declared, did covenant with the said Trustees to levy a fine of his said Estate before Michaelmas Term next following, to the Use of himself and Elizabeth his Wife, and to the Survivors of them for Life, then to George his Son for Life, then to Mary his intended Wife for Life, and afterwards to the Heirs of the Body of the said George to be begotten on the Body of the said Mary, Remainder to his own right Heirs.

There was no fine levied, but three Years after the Sealing this Deed John Dalacourt made his Will, in which (amongst other things) there was this Clause, viz.

Item, I do ratify and make good all those my Estates made or granted in Marriage to George my Son, according to the Writing made by me in Trust.

The Jury found that there was no Writing made by him in Trust to any other Person or Persons whatsoever, other than the Deed of the fifth of June, which they found to be the very Deed of John Dalacourt.

They found that the said John Dalacourt had Issue John his eldest Son and Heir, who entered and died, leaving Issue Mary his only Daughter and Heir.

They find that George his second Son and Mary died, leaving Issue a Son, who was Lessor of the Plaintiff, &c.

The Question was, Whether the Will did supply the Defect in the Deed, which without a fine would not operate to create an Estate-tail in George the second Son?

It was argued that it did, and that the Plaintiff had an Estate-tail; for in Wills, if the Intention is certain, though not fully expressed in Words, 'tis well enough.

Now the Intention of the Testator is very certain here from the Nature of the Thing devised, viz. I do ratifie all those my Estates granted to George in Marriage: by which Words he takes Notice that George was married, that he granted an Estate to him, which is a compleat Description of the Deed, especially since 'tis found that there was no other Writing.

Hob. 32.
1 Roll.
Abr. 611.

And this agrees with the Rule of Law, that a Devise must be taken according to the Intent of the Testator, so as such Intent is expressed in the Will; and therefore since the Statute of Uses, if a Devise was, that his Feoffees shall convey the Land to N. and his Heirs, this is an immediate Devise of the Land it self by Reason of his Intention.

* It must be
after the
Statute of
Wills.
Poph. 188.
1 Leon. 313.

Now, it hath been held, that a Man might devise an Use before the Statute; for if he had made Feoffees to Uses (which he could not by the Common Law, though he might by Custom) before the Statute, and * afterwards he had devised, that the Feoffees should convey such an Estate to W. this is also a good Devise because of the Intention of the Party. Brook. Abr. Tit. Devise placito 48.

2 Cro. 145.

But a Case which comes nearer to this in question, is that of Molineux and Molineux, as reported by Justice Croke, viz. It was a Devise of several Rents expressed in several Writings; and it was adjudged a good Devise of the Rents themselves; in which Case it is said to be the Opinion of the Chief Justices, &c. that if a Feoffment is made to divers Uses without Livery, which is as great a Defect in the Execution of that Conveyance, as a fine is in this at Bar, and the Feoffor afterwards deviseth the same Lands in such Manner, and to such Persons as he appointed by the Deed of Feoffment, 'tis a good Devise of the Land it self.

Econtra. The Will confirmed no more than what was granted by the Deed, which was nothing at all; it was barely a Covenant to levy a fine to such Uses, which cannot operate to raise any Estate without it is actually levied.

The Words in this Case are doubtful, and the Intention of the Testator doth not plainly appear so far as to disinherit his Heir, who is always favoured by the Law.

Cro. Car. 37.

A Devise of all his Mortgages to R. whom he made Executor, this was held a good Devise of the Lands in Mortgage; but in the same Book it is held, That a Devise of

all

al his Estate, Mortgages, &c. whereof he was possessed, &c. that no fee passed in the Lands mortgaged, because the Heir shall not be disinherited without apparent Intention of the Testator manifested by express and plain Words in the Will.

But without further Argument Judgment was given for the Plaintiff.

Mason versus Hanson

DEbt for Rent by an Administrator due in the Life-time of the Intestate. Upon nil debet pleaded, they were at Issue, and the Plaintiff had a Verdict; and it was moved in Arrest of Judgment that the Plaintiff had made out no Title; for he had set forth Administration was committed to him by the Official Reverendi viri Johannis Hall Præbendarii præbendi & peculiaris jurisdiction' de Brampton in Ecclesia Cathedrali de Lincoln, and doth not say that it did belong to him to grant Administration, &c.

This Official is neither Bishop, Ordinary or Archdeacon; and therefore it shall not be intended, that he had an Authority, if not shewed by the Plaintiff; 'tis otherwise in Case of a Defendant.

This is in a peculiar Jurisdiction, and therefore in entitling himself, the Plaintiff ought to say, cui administratio pertinet, &c. and shew that he had a lawful Power to grant it, for it shall not be presumed to be proved at the Trial; he may have a peculiar Jurisdiction to be exempt only from the Visitation of the Bishop, but not to grant Administration.

Econtra. This might have been a good Objection upon a Demurrer, but 'tis cured by the Verdict since the Statute of 17 Car. 2. and before the making that Statute, it hath been held that in an Action brought by an Administrator, omitting profert hic in Curia literas Administrationis, was good after Verdict; so the Judgment in this Case was affirmed.

1 Show. 355.

Cro. Eliz.

431, 791.

879.

Sid. 228.

Styles 282.

16 & 17.

Car. 2.

Aob. 38.

1 Roll. 78.

2 Saund. 402.

Sid. 98.

Hele *versus* the Bishop of Exeter, & al'

Cases in Par-
liament 88.
3 Lev. 311.
2 Salk. 539.

In a Quare impedit the Plaintiff Sampson Hele declared, That he was seized of the Manor of Southpole in the County of Devon in Fee, to which the Advowson of the Church there did belong, and that being so seized he presented, &c. that his Presentee was afterwards admitted and inducted, and that the Church became void by his Death, and that now it belonged to him to present, but was hindered by the Bishop and his Collatee, &c.

The Bishop pleaded in Bar, viz. That the Church was within his Diocess, that he claimed nothing but as Ordinary, that it was a Benefice with Cure, &c. that the Church became void by the Death of the last Incumbent, &c. that the Plaintiff did present to him Francis Hodder within six Months after the Vacancy, as his Clerk, qui quidem Franciscus Hodder fuit Persona in literatura minus sufficiens seu capax ad habendum dictam Ecclesiam, &c. that the Bishop did examine him, as he lawfully might, and upon his Examination found him to be in literatura minus sufficien' ac ea ratione fore personam inhabilem & minime idoneam ad habendum beneficium cum cura animarum; for which Reason the Bishop did refuse to admit him, and gave Notice thereof to the Plaintiff within six Months after the said Refusal that he might present another, &c. That the Plaintiff did not present within the six Months, by Reason whereof it belonged to the Bishop to collate, &c. who thereupon did collate the other Defendant, who was instituted, &c. Et hoc paratus est verificare, &c.

The Incumbent pleaded the same Plea;

The Plaintiff replied That Hodder was Vicar of the Church of Uxborough in Comitatu prae. at the Time of his Presentation to Southpole; that he was homo literatus, and in Priests Orders, and was licensed to preach the Word of God by the late Bishop of Exon, and had celebrated Divine Service many Years, and was satis & sufficienter literatus to celebrate the same, &c.

There was a Rejoinder and Sur-rejoinder much to the same Effect with the Plea and Replication, and upon a Demurrer to the Sur-rejoinder, the Question in the Common Pleas was, and afterwards in B. R. upon the Pleading.

For

For it was admitted by both Courts that the Ordinary in this Case was not a Minister, but a Judge constituted by the Law of the Land, and that it was proper to his Office as Judge to examine Persons presented to him by Patrons, &c. and if he found them defective in Learning, that he may refuse to admit them.

That it was against Sense and Reason, and against a plain and positive Law to object, that because this Person hath been ordained by a former Bishop, and admitted to another Curacy, that therefore he shall be presumed to have a sufficiency of Learning: and that his former Examination and Admission, shall be an Estoppel (as it was said) against all succeeding Bishops of that or any other Diocess.

For every Ordinary is obliged by the Duty of his Office to judge for himself; and therefore 'tis plainly against Common Reason for him who is appointed to be a Judge, to say a Man is sufficiently learned, because another Person in the same Office hath thought him so.

'Tis likewise against a positive Law; for the Statute of Articuli Cleri provides, That if the Bishop refuseth to admit Ecclesiasticks propter defectum scientiæ, they shall not be examined by the Lay-men, for that is against the Canons, but they shall go to an Ecclesiastical Judge, cui de idoneitate personæ præsentatæ pertinet examinatio. 9 Ed. 2.
cap. 13.

Now 'tis plain by these Words the Presentee must be idonea persona, and that the Bishop to whom he is presented is the Judge of his Ability.

But in the Common Pleas the chief Objections were to the Pleading, and therein it was considered,

(1.) What Learning was requisite to capacitate a Man to have a Living, Cum cura animarum?

(2.) Whether by the Plea it was sufficiently shewed that Hoder the Presentee was incapable?

As to the first Point, an ordinary Sufficiency in Learning is enough to entitle a Man to preach, for otherwise in many Parishes there would be no Preaching; and that to understand the Latin Tongue was not an absolute Qualification to reading and praying, since both the Scripture and Liturgy are now in English.

'Tis true, as to Preaching 'tis required by a particular Law to understand the Latin Tongue, viz. to be able to answer and render to the Ordinary an Account of his Faith in 13 Eliz. 12.

in Latin, otherwise not to be admitted to preach: and since that is allowed by the Law to be a sufficient Qualification, the Defendant ought in his Plea to have pursued the Statute by shewing that the Presentee could not render an Account of his Faith in Latin.

But be it how it will, minus sufficiens in Literatura can be no good Plea, because of the Incertainty.

(2.) And therefore the Defendant ought to have set forth in what Learning this Hodder was defective, that this Court might judge whether it was good Cause of Refusal by the Bishop.

3 Rep. 68. b.

'Tis a Rule in Law, That all Pleas which go to the Disability of a Person ought to be certain, and therefore a Plea of Excommunication, propter contumaciam in non comparendo, being lawfully cited, hath been adjudged naught, because it doth not shew any special Cause, that the Judges of the Common Law may see whether the Spiritual Court had Cognizance of the Original Cause.

Lit. Sect.
195.
Rast. Entr.
686.

So in an Action brought by a Villain, formerly, it was not enough for the Lord to plead that he was his Villain, but he must shew how, viz. quod præd A. est villanus ipsius B. spectans ad manerium suum de R. &c.

But for an Authority in Point Specott's Case was relied on, where the Bishop pleaded, that the Presentee was Schismaticus inveteratus, and the Plea was held ill, because he ought to shew the particular Schism; for tho' he is appointed Judge de idoneitate personæ, yet because 'tis to justify his own Act to the Prejudice of another, which Act is of Record, therefore such general Allegation is not good.

'Tis no Objection to say, That the temporal Courts cannot determine what is Schism; for let the Cause of Refusal be what it will, it must be directly set forth and alledged: If it be spiritual, the Party may deny it, and then the Court must write to the Metropolitan to certify the Cause, whether just or not; if it is temporal, then he may traverse it, and the Issue taken upon the Traverse shall be tried by a Jury.

Cro. Eliz.
186.
Sid. 295.
March. 96.

In Common Actions on the Case the Law requires Certainty, and an Element de uno Messuagio sive tenemento, or de uno Messuagio sive repositoio was held ill, because of the Incertainty in the one Case, and because of the various Signification of the Word Repositorium in the other Case.

Many more Instances may be given of this Nature, the Books are full of them: As, if Detinue of Charters be pleaded in Power, 'tis not good without shewing the Certainty of the Writings, or that they were in a Chest, &c.

So where a Man undertook to bring a sufficient Man to be Bail, &c. 'tis not enough to plead, That he brought a sufficient Man, but he must shew quomodo sufficiens.

And if the Law requires so much Certainty in these Cases, a fortiori 'tis required in all Pleas, which go to the Disability of a Person in his Profession.

The word *Literatura* is an ambiguous and equivocal Expression, it signifies Grammar Learning, Writing, Reading, or any sort of Learning, possibly the Bishop might intend that Hodder did not write a good Hand; he could not mean any such Learning, which was proper for his Profession, because that must be particularly alledged to shew wherein the Insufficiency did consist; but if Issue had been taken upon this single Word *Literatura*, the Court would have been misguided; for if he had been found insufficient in the Mathematicks or Astrology (for those are *Literaturæ*) he must have been refused.

Econtra. First it was premised, That no particular Rules or Measures were settled by the Law to shew what Learning was sufficient to qualify any Man for a Benefice; therefore a General Allegation that he is minus sufficiens in *Literatura* is enough to unqualify him for that Purpose.

And this would not be any Means to exalt the Power of the Ordinary by giving him a Latitude of Refusal upon such a general Instance of Disability, and so to injure the Patron in his Right of Presentation: For if the temporal Courts should take upon them to judge in this matter, 'tis the same Thing to the Patron, because 'tis equal to him which of those is to declare the Insufficiency of the Person presented.

Therefore this Pleading must be good.

- (1.) From the Impossibility of pleading it otherwise.
- (2.) That it is certain enough.

First, From the Impossibility of pleading otherwise, for the Nature of the Thing will admit of no greater Certainty; if the Bishop should set down every particular Defect in Learning,

ing, it would be impossible to join Issue upon it; and then the Plaintiff would have demurred, &c. If he should assign but one particular Cause, that would likewise be insufficient, because one single Act would not make a general Inability, as those words minus sufficiens do import, and therefore inhabilis, &c.

Learning is a Thing which consists in many Particulars, and the Judgment which is to be made upon it may arise upon Variety of Questions and Answers; the Right of Examination belongeth to the Bishop; and therefore if he find any Defect in Learning, he may refuse the Clerk, and plead, as he hath done, minus sufficiens in literatura, for he cannot plead otherwise.

All other Inabilities of a Clergy-Man consist and do depend upon one single Instance, as Bastardy, Excommunication, &c. and therefore the true Reason why in all such Cases Criminosus generally is not a good Plea, is, because if any one of those single Instances is distinctly alledged, and well proved, it would make the Clerk minime idoneus, &c.

But it would not be sufficient to say a Man is unlearned because he is defective in one single Point of Learning, or in any one Art or Science; this Defect must arise from a general Inability, and doth consist in many Particulars impracticable to be enumerated in a Plea, and not to be proved by one single Instance.

(2.) The Certainty of this is to be considered in Relation to the Method of the Trial, and the Matter to be put in Issue.

And as to that, greater Latitude hath always been allowed in the Trial of spiritual Causes than in those tried in the temporal Courts; therefore those who argued against the Plea in Specor's Case, said, That criminosus and perjurus was not good without shewing the Particular Cause wherein, &c. which the Lord Anderson held to be true, but took this Difference, because those Acts were triable at the Common Law; and Matters, which are issuable there, ought to be particularly alledged: But where the Action is once well commenced, and Literature which is the Substance of the Plea comes in incidentally, tho' the Trial is to be by Ecclesiasticks, yet the temporal Courts shall proceed to give Judgment upon their Certificates.

Hob. 296.

Dyer 254.
2 Roll. Abr.
355.

The Bishop of Norwich's Case cannot with any Reason be objected to this Matter: It was in a Quare impedit, where he pleaded, that all the while he had been Bishop, &c. the Presentee was a Common Haunter of Taverns, and of unlawful

unlawful Games, ob quod & diversa consimilia crimina, he was criminofus, &c. 'Tis true this was held an ill Plea, but not from the Uncertainty of it; 'twas because the Matters of which he was accused were not evil in themselves, but were Offences only prohibited by particular Laws, and so no just Cause of his Refusal.

The only Case which can be objected with any Colour is Specott's Case in the 5th Report, where it was held, That the Bishop ought to shew the particular Schism, &c.

But this Plea might be distinguished from that Judgment several ways.

First, Because in that Case there was a Possibility to set out the particular Schism; but the Insufficiency of Learning cannot be set forth, because (as hath been said) it depends upon such Variety of Questions and Answers, and doth not consist in any particular Thing, so as to work a general Disability.

If one single Instance had been sufficient for that Purpose, the Bishop might have returned this, viz. The Act of Uniformity having prohibited Preaching without a Licence from the Ordinary, and enjoined the Reading the 39 Articles in his Presence, and declaring the Persons Assent therunto: It was done thus, viz.

13 & 14
Car. 2 cap. 4.

Ego subscribo ad tricena novena articulorum fiderum.

In the next Place the Statute of Articuli Cleri provides, That Persons who are spiritual, shall not be under Examination of Lay-men if the Bishop should refuse them for want of Learning, or other reasonable Cause: Now Schism comes under that general Clause, which may be one Reason why it ought to be particularly set forth; because 'tis traversable, but the Sufficiency of Learning cannot be traversed, 'tis only inducing to the Disability of the Clerk.

And then lastly, the Plea in Bar in Specot's Case was in the Affirmative; therefore it ought to have been set forth, wherein he was a Schismatick; but in this Case 'tis in the Negative, and so the Defendant need not shew where in the Clerk was unlearned.

Another Question was raised, viz. Whether Hele the Patron had sufficient Notice in this Case to present his Clerk? And it was said he had not, because the six Months shall commence from the Time of Notice of the Refusal, and the Bishop had collated within that Time, so that till such Notice

5 Rep. Man-
ser's Case.

was given the Bishop was a Disturber; and therefore in the Pleadings the Notice is generally alledged to be the same Day with the Refusal: But however there ought to be a convenient Time.

Kelw. 50. b.
Dyer 327.
Degg 8.

Cro. Eliz.
119.
1 Leon. 31.

But it was answered, and so is the Law, That in Case of Refusal for Inability the six Months shall commence from the Time of the Death of the last Incumbent; because the Patron ought to present a Clerk that is qualified, otherwise his Presentation is void, and shall not prevent the Lapse.

'Tis true, it has been the Opinion of this Court, That Notice of the Refusal ought to be given to the Patron immediately, or within convenient Speed as may be: Those are the Words of the Book; but 'tis to be observed, that it was in a particular Case, where the Patron did not present till sixteen days within the six Months after the Avoidance: so that the Time expiring, the Bishop refused the Clerk, but gave no Notice to the Patron till three Days after the Months were expired, and then collated: Now this was held (and with good Reason) too long a Time for the Bishop to delay the Notice, it was purely a Design to prevent the Patron of his Presentation: For, if he had given Notice before the six Months had been expired, the Patron might have presented another qualified.

Besides, in the Case at Bar, the Patron had four Months Time to present after Notice, &c.

But upon the Uncertainty of the Pleading, Judgment was given in the Common Pleas for the Plaintiff, and affirmed upon Error in B. R. but afterwards reversed in Parliament.

Bagnell versus Abnett.

In the Common Pleas.

In a special Verdict in Ejectment the Case was thus:

John Herbert was seized in fee of the Tenements in question, and had Issue two Daughters;

Margaret, married to one Lander, and Elizabeth.

Margaret had Issue John and James, &c. and the said John Herbert being so seized of the Tenements aforesaid, called by the Names of Upper and Lower House Tenements, one of which the Jury found to be of the yearly Value of 30 l. per Annum, and
the

the other of 40 l. devised them in these Words, viz. I devise All my Messuages in Milwich, Corton, and Frasdale (to Trustees, &c. naming them) upon special Trust for Payment of Debts, until my Grandson John Lander attain the Age of 21 Years; and from thenceforth I give All my said Messuages, Lands and Tenements in Milwich, Corton, and Frasdale, as followeth; Videlicet Two Parts of the Neither House Tenement (the Whole in three to be divided) for the raising of 200 l. &c. the Remainder to John Lander and the Heirs of his Body, Remainder to James, and the Heirs of his Body, Remainder to the right Heirs of the Debtor; the other third Part after some Trusts, &c. he devised to John and James ut supra, but did not mention the Upper-House Tenements.

John Herbert died, and John Lander also died without Issue, &c. and James the second Son of Margaret was Lessor of the Plaintiff.

The Question was, Whether the Videlicet, and the Clause which follows shall relate only to restrain the Devise to the Neither House alone, or whether the whole Estate is not by general Words devised to the Grandson; for if not, it must come to the Daughters?

The Clause coming after the Viz. doth not restrain this Devise to the Nether-House Tenements; but upon the whole Construction of the Will, both the Tenements pass to the Lessor of the Plaintiff; for the general Words comprehend the whole Estate, and the Viz. is only directive how Part of it shall go, and if it be not thus expounded 'tis repugnant.

Econtra. The Upper-House Tenements do not pass, for both are distinct Parts of the Testator's Estate, and distinctly devised; therefore 'tis against the Rules of Law, That one should pass by the Devise of the other, especially in this Case, where the Testator himself distinguished them by his Will.

Agreeable with this was a Resolution in this Court, Hilary, 11 Car. viz. A Man was seized of a Corner-House, and another contiguous in the Occupation of several Tenants, and devised the Corner-House, reciting it to be in the Occupation of the proper Tenant, and of him who was likewise Tenant to the other House: Now they would have that other House pass by that Devise, because the Tenant of it was named; but it was held, that it should not, for nothing passed but what was particularly expressed, which was the Corner-house, and that the mistaken Addition

Cro. Car.
447.
1 Roll. 614.
Jones 379

dition of a wrong Tenant, should not make that void, which was sufficiently made certain by the Name of a Corner House.

Cro Eliz. 15.
2 Leon. 226.
3 Leon. 130.
Moor 123.
124.

Where-ever any Land is expressly devised, no Implication, tho' never so strong, shall carry it otherwise; as if a Man have a Farm called by a particular Name, Part whereof was let, and Part used by the Owner himself, who devised all his Farm (naming it) and the Lands thereunto belonging (in the Tenure of his Tenant) to his Wife for Life, and that it and all the rest of his Lands shall remain to R. after the Death of his Wife; these Words shall not carry it by Implication to the Wife, because there was an express Devise to her before of the other Part.

Dyer 261. b.

Many more Proofs might be brought of this Nature, the Books are full of them, both modern and ancient, viz. as where a Man having Lands in a Vill and in two Hamlets in the same Vill, devised all his Lands in the Vill, and in one Hamlet by particular Name; it was held, that no more passed than what was expressed, and that the Lands in the upper Hamlet did not pass.

Cro. Eliz.
674.

But the Case which comes nearest to this in Question, is where the Testator had a Farm which extended to two Villages, which Farm was called Heylands, and the Devise was of all his Land (in one Vill, naming it) called Heylands, &c. nothing passed but what was in that Vill; and the Reason given was, because nothing more shall be intended than what was expressed by the Testator.

1 And. 123.

There is yet a stronger Case than this at Bar; it was, viz. a Man had an House in Oxfordshire, and House and Lands in Hertfordshire; and the Will was, viz. I bequeath all that my House in L. in Oxfordshire, with all other my Lands, Meadows and Pastures &c. in Watford in the County of Hertford &c. Now it was adjudged, that the House in Watford did not pass, because it was in a Will which must be construed according to the express Words and Intent of the Devisor; if it had been in a Grant, then the House would have passed as well as the Lands; for every Man's Grant must be taken in the strongest Sense against the Grantor himself; and of this Opinion was the Court in the principal Case, viz. that the Adverb videlicet was distributive here, and shewed what the Devisee should have; so the Plaintiff had Judgment nisi.

Whittington

Whittingham *versus* Andrews.

Error of a Judgment in Ejectment in the County Palatine of Durham; the Declaration was de Mineris carbonum in Gateside. 1 Show. 364.

It was objected, that this was very uncertain; for the Plaintiff should have named how many Mines, because in that County several Men have many Mines in one Place.

This is as uncertain as an Ejectment of three Acres of Meadow and Pasture, not shewing how much of either.

So an Ejectment of a Messuage and ten Acres of Land, twenty of Pasture, and twenty of Meadow per nomen of a Messuage and ten Acres of Meadow more or less. Now the Words more or less, could never be intended to extend to forty Acres more, there being only ten Acres demised, and for this Uncertainty a Judgment was reversed. Yelv. 166.

It will not lie of a Close, but it must be of a certain Number of Acres, and the Number of the Acres must be particularly set forth; and this was Savill's Case. 2 Roll. Rep. 166. Style 193. 202. Yelv. 118. Cro. Car. 573. 11 Rep.

Econtra. No greater Certainty is required than that the Sheriff might know of what to deliver Possession, which is done here, for the Words de Mineris carbonum ascertain the Nature of the Thing in Demand.

'Tis true an Ejectment de omnibus & omnimodis decimis is not good, because of the Uncertainty of what Nature the Things are; but if the Word Fœni or Lanz is added, 'tis well enough, because the Nature of it is then made certain.

This Action is in the Nature of Trespass, because of the Damages which are to be recovered; and one may bring an Action of Trespass for a Piece of Land without any other Certainty. Owen. 19. 1 Gold. 172. 173. Cro. Eliz. 584.

It cannot be denied, but that many Judgments have been reversed for the Uncertainty of the Demand; but this Case was not so uncertain that Execution could not be had of the Judgment. Moore pl. 587. pl. 976. contra.

The Exception is, that 'tis de Mineris carbonum; if it had been de Minera, that is admitted to be certain enough.

Now the Nature of the Thing will admit of no other Certainty, for a Mine of Coals runs through many Lands; and though 'tis but one Mine, yet when 'tis opened they usually make

make several Shafts to let in the Air; and if the Plaintiff had declared but for one Mine, he could have recovered but one Shaft.

'Tis Usage must support this Ejectment: If 'tis brought of fifty Acres in Ireland, though such a Declaration would be uncertain here, yet this Court would not reverse a Judgment given there without writing thither to know the Usage; and of this Opinion was the Court, That it may be good by Custom of the Country; and therefore the Judgment was affirmed.

Rex & Regina *versus* Marriot.

2 Lev. 221.

By the Statute of 5 & 6 Ed. 6. 'tis enacted. That no Person shall keep an Alehouse, but such who shall be admitted thereunto, and allowed in open Sessions of the Peace, or else by two Justices of the Peace, *Quorum unus*, &c. under the Penalty of three Days Imprisonment without Bail, and not to be discharged without giving a Recognizance with two Sureties to do so no more.

Palm. 388.
2 Roll. Rep.
398.

The Defendant was indicted for keeping of an Alehouse without a Licence; and it was objected, that it would not lie, because it was not an Offence at the Common Law, but made so by this Statute, which gives Power to the Justices of Peace in their Sessions to make Enquiry into these Offences by Presentment, Information or otherwise, &c.

7 Rep 36.

But an Indictment is another sort of Punishment which is not provided for by this or any other Statute: Now where a Law makes an Offence, and appoints the Method of Prosecution, it must be punished according to such Method, and no otherwise.

1 Cro. 643.
2 Roll. Rep.
247.
8 H. 6. cap.
11.

This was the Opinion of the Court in Castle's Case, who was indicted for taking upon him the Office of a Justice of the Peace, not having 20 l. per Annum, and sending out of a Warrant by Virtue of his Commission; the Penalty appointed by the Statute, is 20 l. a Moiety to the King, and the other to the Informer, to be recovered by Action of Debt at the Common Law, and therefore not to be indicted.

Econtra. The Party may proceed by way of Indictment, tho' 'tis in a Case where a new Offence is created by a particular Law; and where the Penalty is directed to be recovered by Bill, Plaint or Information, for those are affirmative

negative Words, and shall not take away the general Method of Proceeding according to the Course of the Common Law

The Thing prohibited is of publick Concernment, and an Indictment will lie against the Offender, if there are no negative Words to restrain that way of Proceeding. 1 Mod. 36.

Chief Justice. An Indictment being a summary Way of Proceeding, is more beneficial for the Subject, and therefore it seems reasonable that such a Method should be pursued.

To convey a Maid from her Parents under the Age of sixteen Years, is no Offence at the Common Law, 'tis made so by a particular Statute, and Authority is given to the Star-chamber by Information, and to the Justices of Assize by Indictment to determine these Offences, but yet the B. R. is not excluded; and so it hath been constantly held since the making of the Law. 4 & 5 P. & M.

'Tis prohibited by the Statute of 22 Car. 2. to travel with more than five Horses at length; this is a new Law and a new Offence, and yet it was held, that an Indictment would lie in B. R. against the Offender, tho' a particular Punishment is directed by that Statute.

But Dolben and Eyre Justices, were of a different Opinion; they never heard of an Indictment before for keeping an unlicenced Alehouse; and this seems to be the Judgment of the Parliament in 30 Car. 2. that an Indictment would not lie, because the Conviction is to be upon View by the chief Officer within his Limits, or by Confession of the Party, or by Oath of two Witnesses, and then the Penalty is to be levied by Distress, &c. 3 Car. ca. 3.

White *versus* England.

By the Statute of 5 Eliz. 'tis enacted, that none which hath not served an Apprenticeship seven Years in any Art or Mystery then used, shall use the same, &c. upon Pain to forfeit 40 s. per Month.

An Action of Debt was brought upon this Statute against the Defendant for using the Trade of a Tiler, not having served an Apprenticeship for seven Years.

The Defendant pleaded, That his Father was a freeman of London, and that he was his eldest Son, and that jure patrimonii he might use that Trade.

V

Upon

Upon a Demurrer to this Plea the Counsel did not rely upon it, but took Exceptions to the Declaration, because 'tis not shew'd that the Trade of a Tiler was an Art or Mystery used in England at the Time of the Making of the Statute.

To which it was answered, that it was a Trade mentioned in the Statute, and so by Consequence must be then used; but the Plaintiff was advised to waive his Demurrer, which he did, and paid Costs.

Howard *versus* Tremain.

1 Salk. 278.
1 Show. 363.

On the sixth Day of June 1681. a Bill was exhibited in Chancery, and a Commission prayed to examine Witnesses in perpetuum rei memoriam.

In Trinity Term following the Defendant had a Commission to answer, and the Plaintiff examined his Witnesses de bene esse, but no Answer came in till two Years afterwards, in which time two of the Witnesses died; and the Question now was, Whether these Depositions could be read in Evidence at a Trial at Bar.

It was said, that it was the usual Practice in Chancery to examine Witnesses de bene esse, and that if they died before they are examined in Chief, their Evidence is good; but if such Evidence should not be allowed at Law, it would be a Means to enlarge the Jurisdiction of that Court, and the Party grieved would have a new Equity.

Nothing is more necessary than that the Examination of Witnesses should be in the proper Court where the Cause is depending; and this is the Means to do it, viz. to examine them de bene esse; if the Defendant should be obstinate, and refuse to answer, he may stand out in Contempt of the Court, and so prevent the Plaintiff from perpetuating his Evidence; and this is no Inconvenience to the Defendant otherwise than by punishing his Person by Imprisonment; for after his Answer comes in, he hath the same Advantage in every Respect, as he had before he was in Contempt.

'Tis no Objection to say, that Issue was not joined in Chancery, because where Depositions taken in that Court, are given in Evidence at Law, there is no Proof but of Bill and Answer filed in the Cause.

And

And therefore in the Case of Ford and Gay Depositions, tho' exemplified, were refused by my Lord Ch. Justice Pollexfen to be given in Evidence, because there was no Proof of an Answer.

Econtra. There can be no Examination of Witnesses upon a Bill alone, and the Fault is in the Plaintiff for not compelling the Defendant to put in his Answer in two Years after the Bill filed.

Now when his Answer was filed, those Depositions which were taken de bene esse are of no Use; for suppose a Bill is brought against Husband and Wife for something which the Man claimeth in Right of his Wife, and Witnesses are examined de bene esse, and then the Husband puts in his Answer, this shall not prejudice the Wife without her Answer.

This Court will not allow Depositions taken before Commissioners of Bankrupts to be given in Evidence here, nor Depositions taken in the Ecclesiastical Courts, and yet those Courts have the King's Authority to examine Witnesses.

Curia. Nothing can make it Evidence but the Necessity of the Thing; 'tis true, in Cases of Wills it may be necessary to examine Witnesses to perpetuate their Testimony, but in this Case the Plaintiff was nonsuited upon Evidence viva voce, and afterwards exhibited a Bill, and obtained these Depositions upon Examination of his own Witnesses, which is but Paper-evidence at the Best, and therefore they enclined not to allow it: Tamen quare.

These Depositions by the Opinion of the whole Court were allowed to be given in Evidence, which was done accordingly.

Rex & Regina *versus* Bullock.

By the Statute of 33 H. 8. 'tis enacted, that none shall shoot, or keep in his House a Cross-bow, Hand-gun, &c. unless he hath Lands to the Value of 100 l. per Annum in pain to forfeit 10 l. for every Offence; and that any Person may carry the Offender before the next Justice of Peace, who upon due Examination and Proof hath Power to commit him till he pay the Penalty: Justices in Sessions and Stewards of Leets have Power to hear and determine these Offences.

The Defendant not having the 100 l. per Annum, did shoot in a Gun in February, and in March following was brought before a Justice of the Peace, and by him was convicted of this Offence.

And now a Motion was made to quash this Conviction, because it was before a single Justice, who had not Power by the Statute to proceed in a summary Way, unless the Party is brought before him instantly upon View of the Offence committed, which was not done in this Case, and therefore the Prosecutor was ordered to shew Cause why it should not be quashed.

Anonymus.

NOta, an Order was made at a Mineral Court held at Mendipp in the County of Somerset, that the Defendant should forfeit his mineral Tools and Goods, and be banished from Mendipp-hills for ever.

This Order being returned, it was moved to quash it, and the Court held it to be an Order against Law, and not to be supported but by some special Custom.

Anonymus.

There was a Libel in the Spiritual Court against the Defendant for not paying of a Rate towards the Repair of a Church, &c.

He suggested that the Lands were in the Occupation of his Tenant, and that he was not an Inhabitant in the Parish where this Church was, &c. And this was held a good Suggestion; for 'tis contrary to Law to charge the Person with Repairs who doth not live in the Parish; the Tenant of the Land should be charged, and not the Owner.

2 Roll. 228.

If a Man take a Lease of a Stall in a Market-town, where he useth once a Week to sell his Wares, but lieth in another Parish, he shall not be charged towards the Repairs of the Church in that Market-town.

D E

Term. Sanct. Mich.

Anno 4 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1692.

Barker & al' *versus* Lade.

E Broz of a Judgment in the Common Pleas in Replevin wherein the Defendant Baker made Conufance as Bailiff to Nicholas Marsh, &c. and fets forth, That before the taking the Cattle, one Robert Lade was seized in fee of the Place where, &c. who in Consideration of 100 l. &c. did by Deed grant to Nicholas Marsh Grandfather to the Abowant, a Rent of 8 l. per Annum in fee, Exeun' de omni illo Capitali messuagio five tenemento cum pertinentiis in Barham & de omnibus terris & hæreditamentis præd. messuagio spectan. tunc in occupatione præd. Roberti Lade unde præd. locus in quo, &c. est & præd. tempore quo, &c. fuit parcel' &c. with a Clause of Distress.

Vide The
Pleadings in
2 Vent. 145.
3 Lev. 291.

That by Virtue thereof the said Nicholas Marsh became seized of the Rent, who devised it to Richard Marsh, and his Heirs &c. who by Deed, &c. pro & in consideratione naturalis amoris & affectionis quæ gessit prædicto Nicholao modo defend. filio suo & summæ quinque librarum, to be paid to the Grantor yearly during his Life, Dedit concessit assignavit & transposuit to the Defendant, the said Rent, to have and to hold to him and his Heirs for ever, by Virtue whereof, and of the Statute for transferring of Uses into Possession, the Defendant was seized in Dominico suo ut de feodo, &c. and for six Years Rent, &c. distrained; and so Marsh

in

in jure suo proprio bene advocat & Baker ut Ballivus of the said Marsh bene cognovit the Taking, &c.

To this the Plaintiff demurred, and the Defendants joined in Demurrer.

(1.) The first Objection to this Pleading was that the Place where, &c. was not plainly and sufficiently alledged to be charged with this Rent at the Time of the Grant thereof made to Nicholas Marsh the Grandfather, for it should have been shewed, that the Place, &c. did belong to the said Mesuage, or that it was in the Occupation of the Grantor at the Time of the Grant, as well as tempore quo, &c. the Distress was taken.

(2.) The second Objection was, That this was pleaded as a Grant at the Common Law by the Words concessit assignavit, &c. without Attornment or Enrollment, it being in Consideration of Money paid, &c. and for this Reason the Plea was not good; and of this Opinion was Pollexfen Chief Justice: But the other Justices contra; for they held, That the Consideration of the Grant being as well for natural Affection as Money, it would amount to a Covenant to stand seized, &c. and might be pleaded without an Enrollment.

Upon this Judgment a Writ of Error was brought, and it was now argued, That admitting this Deed did enure as a Covenant to stand seized, &c. it ought not to have been pleaded by the Words dedit & concessit, &c. but as it operates by Law, viz. Concessit & agreevit quod seiscitus existet.

Many Instances may be given to prove this Matter: One Jointenant maketh a feoffment to the other; this cannot make a good Deed at the Common Law; for he cannot make Libery and Settin, because the other is jointly seized with him; yet this Deed shall enure by way of Confirmation, and must be so pleaded, and not literally as the Deed is worded.

Br. Abr. tit.
confirmati-
on.
placit. 11.
Plowd.
Com. 156. b.

So the Word dimisit is not only applicable to an Estate for Life or Years; but to an Estate-tail or in fee, but then it must be pleaded as such.

My Ld. Coke in his Comment upon Littleton saith, That dedi or concessi may amount to a Grant, to a feoffment, to a Gift, Lease, Release, Confirmation or Surrender; and that 'tis in the Election of the Party to use it, to which of these Purposes is most agreeable with his Interest, and therefore he may plead it as either, which shews that the Pleading must be as the Deed doth enure and

1 Inst. 301. b.

and operate, and not as the Words are in the Deed it self.

And therefore if one Joint-tenant plead, That the other Concessit to him, &c. this Plea is ill, because a Grant is not a proper Conveyance from one Joint-tenant to another, it must be by Release; but if a Jury had found quod concessit, that being the Saying of the Lay Gents, would have been helped by the Court, and adjudged to be quod relaxavit.

If Tenant for Life grant his Estate to him in Reversion, this is a Surrender, and it must be pleaded according to the Operation it hath in Law; and for this Reason chiefly the Judgment was reversed.

Carter versus Firmin.

By the Statute for rebuilding the City of London, 'tis enacted, That no Building or House shall be erected within the Limits of the City but such as shall be pursuant to the Scantlings mentioned in the said Act; and if any Person shall do contrary, being convicted upon the Oaths of two Witnesses, then the House so built shall be deemed a Common Nuisance, &c. 19 Car. 2. cap. 8.

And 'tis further enacted, That all Differences arising between Builders concerning placing and stopping up Lights, shall be heard and determined by the Alderman of the Ward; and if he is Party or cannot determine it, then by the Mayor and Court of Aldermen.

Mr. Carter was possessed of a House in Three King-Court in Fenchchurch-street and Mr. Firmin had a House contiguous; there was a Party-Wall set between both these Houses by the City Surveyor, and both built above 20 Years since.

And now Mr. Carter would build a Stable upon a void Piece of Ground which was never built on before; upon which the other complained to the Court of Aldermen, who sent two Surveyors, being City Officers, to view this Building; upon whose Report that Court hinder'd any farther Building till the Right of the Thing should be determined.

And now Mr. Carter moved for a Prohibition to the Court of Aldermen, and by his Counsel alledged, That they had no Jurisdiction over this Matter: For their Houses were built 20 Years since according to the Rules prescribed by the Act; that the Authority of that Court was limited to the Builders of Houses upon the Foundations of those which

which were destroy'd by the fire, and did not extend to such Persons who built upon new foundations: So that the Houses being built, their Jurisdiction was determined; it was temporary only, and shall not be continued afterwards: And of this Opinion was the Court, and therefore enclined to grant the Motion.

But at another Day this Matter being stirred again, it was said by the Court, that there might be a Custom in the City to regulate Lights, and for the Uniformity of Buildings, but not to determine Mens Rights.

This was said, because the Attorney General insisted that the City-Surveyors were Officers as ancient as any Records of the Corporation; that their Oath is in the Book of Oaths, which is likewise a very ancient Book; that these Officers have in all Times past been appointed to make particular Reports to the Court of Aldermen, to which the Parties concerned have always complied; and that it would be very inconvenient if a Prohibition should go contrary to such an ancient Custom.

Therefore it was ordered that the Plaintiff should declare upon a Prohibition; and that the Defendant might (if he saw Cause) plead this Custom, that so the Court might be judicially apprized of the Matter.

Carter versus Calthorp.

Hill. 3 Willielmi, Rot. 308.

3 Lev. 345.
1 Show. 366.

Error to reverse a Judgment given in the Court of Hall, in an Action on the Case, where the Plaintiff declared, That he was seized of a Messuage, &c. and that the Defendant built another near it, and continued the said Building from such a Day to the Time of the Levying of the Plaint, by Reason whereof he stopped up his Lights & adhuc obstupavit.

There was Judgment for the Plaintiff, and entire Damages given; and now the Error assigned was, That by Reason of the Words adhuc obstupavit, Damages were given for something after the Plaint levied.

To which it was answered, That the Word Adhuc doth refer only to the Time of bringing the Plaint, and not to any Thing which happens afterwards; it is to shew, That the Defendant hath not abated the Nuisance: They are Words only of Form, and used in most Declarations,

viz. Solvere contradixit & adhuc contradicit, &c. and so are the Pleadings in the Entries in this very Case, viz. That the Defendant built a new House, by Reason whereof the greatest part of the Plaintiff's House Magna tenebritate obscurata fuit & adhuc existit; and for this Reason the Plaintiff had Judgment. Vid. Mich. 1 Jac. 2. Rot. 425. Hext versus Burton in C. B.

Davis versus Speed.

Hill. 3 Willielmi. Rot. 261.

In a special Verdict in Ejectment for Lands in the County of Southampton; the Case appeared to be thus.

Cases in
Parliament.

A feme-sole being seized in fee of the Lands now in Question, afterwards did marry William Horn.

104.
5 Mod. 143.
2 Salk. 675.

That the said William Horn and Ann his Wife did by Deed indented covenant to levy a fine thereof to Jollop and Stanley, and their Heirs, &c. to the Uses following, viz.

To the Use of the Heirs of the said William Horn lawfully begotten, or to be begotten upon the Body of the said Ann, Remainder to the right Heirs of the Husband.

The fine was levied, they had Issue one Son, who died in the Life-time of his Father and Mother without Issue; then Ann died, and afterwards William Horn died without Issue.

That Frances Cockey who was the Lessor of the Plaintiff was Sister and Heir of William Horn, and that the Sisters and Co-heirs of Ann had conveyed their Interest to the Defendant Speed.

So that the Question was, Whether the Heirs of the Wife should have this Land?

The Objection why the right Heirs of the Husband should not have it was, because there was no particular Estate for Life limited in this Conveyance to support the contingent Remainders which are therefore void, and the old Use remains to the Heirs of the Wife.

But it was argued in his Behalf that this was a Settlement by way of Use, which like a Will was to be construed according to the Intent of the Parties; and that for this Purpose the Law would raise an Estate for Life in him by Implication, which being united with that Estate he

had by the Settlement it self, would create an Estate-tail in him, and so the Remainders would be good.

1 Mod. 160. And to prove this the Case of Pybus and Mitford was cited, viz. Mitford being seized in fee, had Issue Robert by a first Center, and Ralph and Jane by his second Wife; he covenanted to stand seized, &c. to the Use of his Heirs Males begotten on the Body of Jane, Reversion to his own right Heirs; the Father died, the eldest Son entred, whose Title the Plaintiff had, and the Question was, Whether any Use did arise to the second Son?

Three Judges against the Opinion of Justice Twysden held, That an Estate for Life did arise to Mitford by Implication, because a Limitation to the Heirs of his Body carries the Use to himself, in whom his Heirs are all included, and the old Estate in fee which was left in him is then qualified and turned into an Estate-tail.

Roll. Rep. 1. This was the Opinion of my Ld. Coke in Lane and Pannell's Case, where he said, if a feoffment be made to the Use of the Heirs of the Body, &c. 'tis an Estate-tail executed in him, because he hath an Estate for Life by Implication.

'Tis not material to object, That an Use cannot arise in this Case by Implication, because the Husband hath no Estate but in Right of his Wife; for an Use may arise as well to a Stranger as to the feoffor, because they both joined in the Deed as well as in the Fine: Besides, he hath an Estate for his own Life as Tenant by the Courtesy, and whenever the Husband hath an Estate in Right of his Wife, in Pleading 'tis always said, That scilicet fuer. in dominico suo ut de feodo, &c.

But if no Estate for Life doth arise immediately by Implication, then this may be good by Way of a springing or contingent Use to the Heirs of the Husband, and that till that Contingency shall happen by his Death, the Use must still remain in the Woman and her Heirs.

Econtra. There must be a particular Estate found out to support these Remainders, or otherwise they are void, and the Estate is as it was before the Fine levied, which operates for the Benefit of her, who had the old Estate in her before.

27 H. 8. If this had been a Conveyance at the Common Law, there could have been no Question made, because the freehold, (if any) cannot be put in Abeyance; and 'tis plain 'tis in Abeyance here, because there can be no right Heir of William Horn whilst he is living.

'Tis true, this is a Conveyance by Way of Use, which before the Statute was considered only as a Trust; But now by

by uniting the Possession to those Uses, they are governed by the known Rules of the Common Law; for an Use is an Estate, and must take Place either in Possession or in futuro, as 'tis limited; and therefore where a Fine was levied to the Use of B. for Life, and afterwards to the Use of the Children of C. procreatis, this Limitation shall extend to none of his Children born afterward, because no future Use was limited to them. Cro. Eliz. 334.

In this Case an Use was intended to be raised in presenti to the Heirs of William Horne; now they could not take as Heirs during his Life; therefore there being no Person capable of taking it must be void.

If it was designed to operate in futuro, then there must be a particular Estate somewhere to support the Remainder till the Contingency happens, which Estate must be either expressed or implied.

'Tis plain that here was no particular Estate expressed; then if it should arise by Implication, it cannot be in the Husband, because there are no Words, which shew any such Intent.

But if an implied Estate for Life should arise by Construction of Law, it must be in the Wife, and then she dying before her Husband, that Estate was determined before the Remainder to his Heirs could take Place, and therefore shall never arise; neither could any Estate remain in the feoffees; for by one Branch of the Statute the Possession is given to the Cestui que use; and by another Branch all the Right is taken out of the feoffees, and given to the Cestui que use; so that nothing remains in them; and it would be a very absurd Thing if it should; for if a feoffment be to the Use of himself and his Heirs, till a third Person pay 100 l. and then that he will be seised to the Use of that Person and his Heirs: Now if any thing should remain in the feoffees before the Payment of the 100 l. it must be a fee-simple, and then there would be two fee-simples of the same Land; to avoid which the Statute must be construed to take the whole Estate out of them, and fix it upon the Land, which by Operation of the Statute shall give the Use to every Person in his Turn according to the Limitation of the Parties. 1 Leon. 258.

And therefore it was agreed in Chudleigh's Case, That the Statute doth not transfer the Possession to any Use, but such as is in Being; because it cannot be executed to a bare Possibility of an Use, neither can it be limited against the known Rules of the Common Law. Vid. 2 Roll. Abr. 796. 1 Rep.
Cro. Eliz. 321.

Coria. This is a future Use and no particular Estate to support it; and no such Estate could arise until the Wife died without Issue, and so the Remainder is void.

And afterward in Easter Term Judgment was given for the Defendant Speed accordingly.

That no Estate shall arise by Implication to the Husband; such a Thing was never thought on in a Deed, nor in a Will, but of Necessity.

Cases Adj.
104

There was a Writ of Error brought upon this Judgment in Parliament, but it was affirmed.

Buckley *versus* Collier.

1 Salk. 114.

The Husband and Wife brought an Action on the Case for work done by the Wife during the Coverture, and the Question was, whether they could join in this Action.

Cro. Eliz. 96.

In Trespass they may join for entering on the Land, & herbam ipsorum ibidem crescentem asportavit, &c.

Cro. Car.
434

So likewise where the Husband hath Land in the Right of his Wife, as a Jointure by a former Husband, and she is to have the Tops and Shroves of the Trees growing thereon, and he who hath the Inheritance cuts them down; they may join in an Action to recover Damages, because it surbives to her after his Death.

But the Court was of Opinion, that in the principal Case the Declaration was not good, because the Action was brought for a personal Thing which would not surbive, and in Personal Actions the Law is clear that they cannot join. Cro. Eliz. 133.

Cook *versus* Bosinger.

In Trover the Plaintiff declared, That he was possessed de bonis & catallis sequen. ut de bonis & catallis suis propriis, videlicet de uno scripto obligatorio & una warrantia, &c.

Yel. 68.

The Defendant pleaded in Abatement that the Bond and Warrant were not Chattels; and upon a Demurrer to this Plea it was said, that neither the Bond or the Value thereof can be demanded by such Names, as Bona & catalla, because (as the Opinion is in Yelverton) a Bond will not pass by such general Names.

In Detinue the Thing it self must be specially named, because it is to be recovered in specie: The same Reason may govern this Case.

But it was answered, that by a Gift of all his Goods and Chattels a Bond would pass; and this was the Opinion of Fitzherbert in Dyer, and to his Opinion the Court now inclined. Dyer 5. b. ned.

Rudd *versus* Foster.

In Replevin for taking of a Gelding, the Defendant justified by Vertue of the Statute of the Queen, for Money due upon the Poor Tax. 43 Eliz. c. 2. 2 Salk. 501.

The Parties being at Issue, it was tried at the Bar, and the Question was, Whether the Mill of Stratton was in the Parish of Biggleswade in Bedfordshire, or not?

The Poors Rate was admitted.

And the Evidence to prove it to be in that Parish, was, that there were but two Churchwardens and two Overseers of the Poor, and that Marriages, Burials and Christnings, and all other Parochial Rites were done at Biggleswade, and that the Inhabitants of the Mill of Stratton did contribute to the Repairs of the Church of Biggleswade.

On the other Side, to prove that Stratton was a reputed Parish by it self at the Time of the making of this Statute, this Evidence was given, viz.

In the Reign of Edward III. there was a publick Chapel there where the People went to hear Mass, and that Divine Service was read in that Chapel at the Time of the making of this Statute.

Then it was proved that a Rate was made there in the Year 1654. and that formerly they had distinct Constables, and repaired their own Highways till the Year 1634. and then the Difference between them was settled by the Judges in their Circuit.

They would have this like the Case between the Parish of Tateridge and Hatfield, which was a special Verdict upon this Statute; the Plaintiff lived in Tateridge and had no Lands in Hatfield, but had Lands where he lived; he was rated to the Poor of Hatfield, but because at the Time of the making the Statute, Tateridge was a reputative Parish, and had distinct Constables, Churchwardens and Overseers of the Poor, and made their own Rates and

Cro. Cor.
394.

and Assessments, which were levied by their own Officers; for this Reason that was held to a distinct Parish from Hatfield.

But Stratton was not so much as a Parish in Reputation at the Time of the making of the Act, and so not like that Case; for all that was proved, was that they had made Rates since the Statute, and had a Chapel before; but making Rates will not make it a Parish without all other Parochial Rights, and therefore it was held to be a Vill in the Parish of Biggleswade.

Hoyle versus Pitt.

Appeal of Murder.

Serjeant Pemberton moved, that the Appellee having pleaded a Conviction of Manslaughter at the Gaol-delivery at the Old Baily, and that he was allowed his Clergy; but not shewing by what Authority that Court was held, that therefore the Plea might be amended, it being before Issue joyned or Demurrer.

But the Court doubted whether this could be done by Law; for the Appellant could not amend, and therefore there was no Reason why the Appellee should have that Liberty.

In this Case if you amend, you make a new Roll; 'tis not like other Cases of Amendments where all is in Paper, and warranted by the Usage of the Court, for this is all upon the Plea-Roll.

No Statute extends to Amendments of either Side in an Appeal, and 'tis not warranted by the Course of the Court.

Rex & Regina versus Hicks.

An Information was brought against Marmaduke Hicks, and it was laid in Middlesex in the Name of Sir Samuel Astry, for Exercising the Trade of a Grocer by the Space of three Months, not having served as an Apprentice for seven Years to that Trade, contra formam * Statuti, &c.

* 5 Eliz.

The Defendant did not live in Middlesex, nor use the Trade there, but in another County.

And upon a Demurrer, the Defendant had Judgment, because this Information being grounded upon a Penal Law, it ought to be laid in the proper County where the

Offence

Offence was committed and not elsewhere by the express Words of the Statute of 21 Jacobi c. 4.

'Tis true, an Action of Debt will lie upon the Statute of 5 Eliz. in Middlesex, though the Offence was done in Camberland, because the Statute of King James did not intend to deprive the Courts of Westminster of such Actions, but only of those which might be brought before Justices of Assize, or of the Peace; now Informations may be brought before them as well as in this Court, but Debt cannot.

Sid. 303, 400.

Bennet *versus* Preston.

Appeal of Murder, the Writ was concluded thus, viz. Et habeas ibi tunc hoc Breve.

The Count was, that the Deceased was at the Parish of Clapham in the Peace of the King such a Day and Year, and that ante meridiem ejusdem diei ven. præd. Will'us Preston & quidem Daniel Scholy, &c.

The first Exception was taken to the Writ because of the Word tunc, which is never used in an original Writ.

To which it was answered, That if that Word had been left out, it might have been very well understood, for habeas ibi hoc breve is well enough, and tunc is but Surplusage.

In an Audita querela it was set forth, that the Plaintiff i Leon. 73. captus fuit virtute brevis nostri judicialis, which Word is not in the Register, and therefore it was held Surplusage, and the Writ good.

(2.) The second Objection was made to the Count, viz. 'Tis said, that ante meridiem ejusdem diei the Appellee came, &c. and doth not mention what Hour; now the Statute of Gloucester requires the Certainty both of the Day and Hour, &c.

The Answer was, that the Year and Day shall be accounted from the Day of his Death, and the Hour is not material; for if it had been circa horam octavam, it had been good.

(3.) Another Objection was, that 'tis said ven. præd. Will'us Preston & quidem Daniel Scholy, &c. which was insensible and false Latin; for to say præd. when there was but one mentioned before must be naught, and cannot be Surplusage in an Appeal; for if the Word be wholly rejected, then non constat which of them killed the Person; and if 'tis not rejected, then there is an Adjective to a Substantive not named before, and quidem for quidam is false Latin; so that this Count is neither Sense nor Grammar.

But

20 Rep.
133. 2.

Plow. Com.
415.

But it was answered, that false Latin will not vitiate Indictments, neither shall it be allowed to make void Declarations in Appeals; it may abate an Original Writ, but shall not make any judicial Writ, Count or Pleading void; so is the second Resolution in Osborn's Case.

'Tis true, in an Assize the Writ was, that the Sheriff should summon the Tenants quod sint coram prefat. Justiciariis apud Westm', and no Justices were mentioned before, but the Writ was not abated for this Omission; the Judgment was only stay'd a little upon the first Opening of the Fault, but it doth not appear that it was made void for that Reason.

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Term. Sanct. Hill.

Anno 4 & 5 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1693.

Westerne *versus* Creswick.

THE Plaintiff Westerne had obtained a Judgment against the Defendant upon a Bond, and by Virtue thereof had levied Part of his Debt upon some of his Cattle and sold them.

This Judgment was afterwards set aside, and now Serjeant Tremaine moved, that since Restitution was awarded to the Defendant, that the Money for which the Cattle were actually sold, might be brought into Court for the Benefit of the Defendant, who was then a Prisoner in the King's Bench. This being disallowed, then he offered to pay the Defendant as much Money as the Cattle were sold for; but that was denied likewise, because they might be sold for less than really they were worth; and if the Defendant brings his Action of Trespass, he will recover the full Value, and therefore the Plaintiff must agree with him to prevent such an Action.

Patison *versus* Milton.

THE Declaration was thus, Willielmus Patison queritur de Willielmo Milton in Custod. Mar. Marescal. &c. pro eo videlt. qd. cum Willielmus Patison (instead of Milton) indebitatus fuit Willielmo Patison, &c.

y

After

Latch. 125.
Noy 38.
3 Cro 435,
9C4.

After a Verdict for the Plaintiff, it was moved that it might be amended, for it was a plain Mistake of the Clerk to make the Plaintiff to be indebted to himself: And the Court ordered that it should be amended accordingly without the Help of the Statute; as where an Action on the Case was brought against an Executor upon the Promise of the Testator who pleaded Non assumpsit, and said nothing as to any Promise of the Testator, this was held to be good enough after Verdict.

Justice Dolben said, that quidam tamen Johnson, &c. without naming his Christian Name, was held good; for as Justice Twysden said he would intend his Name to be quidam.

But a Declaration in the Common Pleas was (viz.) that the Plaintiff cognovit se in debitum fore to himself; and after Verdict for the Plaintiff, this was moved, and (as it was affirmed at the Bar) he could never get Judgment in that Court.

Rex & Regina *versus* Tucker.

Cases in Parl.
186.
3 Lev. 396.

Error to reverse an Attainder in High Treason committed in the West of England.

The Indictment was, that the Defendant and another, not having the Fear of God in their Hearts, nor considering the Duty of their Allegiance, but being seduced, &c. proditorie compassaverunt to kill their Supreme and natural Lord, and that they waged War proditorie against the King their Supreme Right Natural and Undoubted Lord, &c. contra pacem, &c. Et contra formam Statut. &c.

Upon this Indictment they were arraigned, Et per Curiam allocuti what they had to say, &c. separatim dicunt, &c.

Then the Judgment was thus, ducantur, & uterq; eorum ducatur usq; ad Goslam, &c. & abinde usq; ad locum executionis trahantur, &c. & super furcam ibidem per collum suspendantur, &c. & interiora sua extra ventres eorum & utriusq; eorum capiantur, ipsiq; viventibus comburantur, &c. Quodq; corpora eorum & utriusq; eorum in quatuor partes dividantur, &c.

This Cause depended many Terms before it received any Determination by reason of the many Exceptions which were made both to the Indictment, and to the Judgment.

And first as to the Judgment.

(1.) It was, that they should be drawn to the Place of Execution, and doth not say *super Hurdellum*; and so is the Case in Staundford, and in 1 H. 7. fol. 29. Pleas of the Crown 182.

To which it was answered, That most of the Precedents are otherwise; 'tis left out in the third Institutes, where the form of the Judgment is set down by my Lord Coke, whose Authority may be opposed to that of Justice Staundford. 3 Inst. 210.

(2.) It was a Judgment against two Defendants, and 'tis said *per collum suspendantur*; and doth not say *uterq; eorum per collum suspendatur*; 'tis also said, that *corpora eorum in quatuor partes dividantur*, without these Words, viz. *Et corpus utriusq; eorum*, for otherwise 'tis not Sense, and it shall not be taken *reddendo singula singulis*. But this was an Exception only mentioned, and not insisted on.

(3.) *Quod secreta membra amputentur*. This part of the Judgment was left out. It was pronounced by my Lord Chancellor Finch in my Lord Stafford's Case upon Debate with the Judges what Judgment must be given for a Peer. Staund. 182.
Dalton 335.
Bolton 38.

But as to that, it was said it was omitted in almost all the Entries and ancient Records; and that it was well comprehended in this Judgment by the Word *interiora*, and that it was not in any Judgment till the Judgments against the Regicides.

(4.) Upon the Arraignment 'tis *per Curiam allocut*, &c. what they had to say, and doth not say *quilibet eorum separatim allocut*.

This Objection was likewise thus answered, That the Defendants were indicted for a joint Offence, and having pleaded severally, it ought now to be taken that they were severally asked the Question, which in its very Nature doth intend a several Demand.

But the chiefest and most material Exception was to the Indictment, and that it did not conclude *contra Ligeantiam suam debitum*.

And as to that, those who argued to support it, said, that some formal Parts were requisite to an Indictment; but if the Body of it contain what is essential and comprehensive of the Fact, 'tis sufficient.

Now here the Fact is sufficiently set forth in the Body of the Indictment, there are several Acts of Treason charged in it, and 'tis laid throughout to be *proditorie*, which must be against his natural Allegiance, for an Alien Enemy cannot be thus indicted.

'Tis true, the Law will not suffer facts to be made out by any strained Constructions of Words or Inferences; but that cannot be objected here, because 'tis said, that he not weighing the Duty of his Allegiance, did levy War against his undoubted and true Lord contra formam Statuti, which are Words enough to supply the Omission of the other, and to make it plainly appear that it was against the Duty of his Allegiance.

This was enforced from some Authorities which had some Resemblance of this Matter.

4 Rep. 41,
42.

As in an Indictment for Murder it was omitted that the Person slain was in pace Dei, for it might be that he was in the fault; yet it was held good.

2 Roll. Abr.
82.

So for a Riot, contra coronam was omitted in the Indictment, yet it was not quashed, because these and such like Words are only in Aggravation of the Offence, and not of absolute Necessity to be used in such Proceedings.

Dyer 68, 69.
1 Bulst. 93.

So likewise ex malitia sua præcogitata was left out of an Indictment for Murder, but 'twas not quashed for that Reason, because the Word *murdravit* in that Case, as well as proditoric in this, implies, that one was done out of Malice, and the other against his Allegiance.

Besides, this is an Indictment grounded upon a Statute which doth not prescribe any form: And the Defendant being found guilty, and Judgment against him, it shall be intended, that what he did, was contra formam Statuti, and by Consequence contrary to his Allegiance.

But this was denied, because the Offence in the Indictment was Treason at the Common Law of which the Statute was only declaratory, and therefore the concluding contra formam Statuti will not make it contra ligantia debitum.

Sid. 358.

Then it was insisted, that there have been many Precedents without these Words, and instanced in Sir Henry Vane's Case, and in Cotton and Messenger's Case, and many more, and yet the Indictments were good; for if those Words had been inserted, it had been only a formal Conclusion from the Premises in the Indictment, and therefore shall not vitiate it being omitted.

Serjeant Pemberton contra. There was never yet any Case wherein this Point was contested and settled.

The doing a Thing against his Allegiance, is the very foundation of this Indictment, and yet it doth not appear that any Thing was done contrary to it.

'Tis true, this Indictment sets forth, that the Defendants not considering the Duty of their Allegiance, did leby War contra naturalem suum Dominum: Now this may be intended as well against the King in his Politick as in his natural Capacity.

There is a Loyal as well as a Natural Allegiance, and therefore if an Alien Amy come hither and commits Treason, the Indictment must conclude, contra ligeantia suæ debitum; but an Alien Enemy cannot be tried by the Common Law, but by special Commission to the Constable or Marshal; and this was Perkin Warbeck's Case who was never under the King's Protection, and therefore his Indictment could not conclude contra ligeantia debitum; which shews that these are Words of Substance, and cannot be supplied by any Intendment whatsoever; for if 'tis Treason, it must be against Allegiance, and ought to be so expressed in the Indictment.

This is agreeable to the Opinion of my Lord Hobert in Hob. 271. Courteen's Case, viz. That an Alien in Amity with us, and living here, is under the Protection of the King, who is Dominus suus, tho' not naturalis; and if such an Alien commit Treason, the Indictment must conclude contra debitam Alliegeantiam. 7 Rep. 6. b. 11. b.

And if 'tis so in the Case of an Alien Amy, a fortiori it ought to be so in that of a natural Subject. 1 Inst. 129.

The Conclusion of an Indictment goes to all, and therefore agreeable to this is the Reason of the Law in other Cases, as in Felony, if contra pacem is left out, the Indictment is never good.

So in Burglary, tho' there is sufficient in the Indictment to imply the fact done to be Burglary; yet if the word Burglariter is left out, the Indictment is naught.

To say furatus est equum will not imply Felonice, neither will carnaliter cognovit supply the Word rapuit, for these are Terms of Art adapted by the Policy of the Law to particular Offences, and cannot be supplied by Intendment. Stamb. 96. 37 H. 8. ca.

Before the Statute of 37 H. 8. the Words vi & armis were so material in Indictments, that many were reversed where those Words were omitted; and tho' they were only formal Words, and not so material as these, yet they could not be left out without the Authority of a Parliament.

To say that murdravit will supply ex malicia sua præcogitata, cannot be Law; and therefore the Print in Dyer is false.

Lastly, Here are no Words in this Indictment to supply the Defect of these Words, contra ligeantia suæ debitum. the Word

Word proditorie will not do it, because a Man may be treacherous, and not act any Thing against his Allegiance; and as for the Clause, viz. contra naturalem suum Dominum, the Indictment had been good contra Regem only, without those Words, so as the Conclusion had been contra Ligeantiae suae debitum; therefore those Words cannot supply this Omission, because it would be very absurd to say, what is necessary shall be supplied by that which is not.

Upon the whole Matter it would be dangerous to admit Innovations in Indictments; and therefore the usual Form being to conclude after this Manner, it must not be omitted, especially considering the Reason of the Thing; for Allegiance and Protection are Correlatives, and do mutuo se tolli & ponere.

Curia. That for Want of Concluding the Indictment with these Words, contra Ligeantiae suae debitum, 'tis erroneous; and that such an Omission will make it so, tho' there are Words in the Body of the Indictment, which tantamount, because a Man may levy War, and not be guilty of the Offence as laid here; for he may be an Alien Enemy; and that was the Reason in Calvin's Case why that Indictment was not concluded contra Ligeantiae debitum.

But there are no Words in this Indictment to supply this Omission.

For debitum Ligeantiae suae minime ponderans will not do it, because a Man may not consider the Duty of his Allegiance, and yet do nothing which is contrary to it.

Then contra Dominum Regem supremum verum & naturalem Dominum suum, &c. will not help it, because those Words are not always essential in an Indictment, they signify no more than to shew that the Offender was born in England; they are Words superabundant, and were added to Indictments in latter Times; for the old Way was to set forth the Offence to be contra Dominum Regem only; so that Words which are not necessary in an Indictment, shall never be construed to supply the Omission of those which are absolutely necessary.

The very Offence of Treason is because 'tis committed contra Ligeantiae debitum, the other Words are but an Aggravation of the Offence, and the Omission of that Clause can be no more supplied by the Adverb proditorie, than the Word felonice could supply contra pacem.

It would be very strange if the Omission of *contra pacem* in an Indictment at the Common Law, and *contra formam Statuti*, for an Offence committed against a particular Statute, should be Error, and yet an Omission of these Words should be none.

'Tis probable this may be a Reason for the making of the Statute of 29 Eliz. by which 'tis enacted, That no Record of Attainder of Treason shall be reversed where the Party attainted is executed for the same Offence. 29 Eliz. c. 2.

For before that Statute there were few Precedents which have these Words, and since the Statute there are few or none besides this wherein they are omitted.

'Tis true, there are several Indictments in the Reign of H. 8. against Offenders for High Treason, which was made so by some new Statutes in those Days; as denying his Supremacy &c. in which Indictments these Words were omitted, but the Reason was because they were new Treasons created by particular Acts of Parliament, and 'tis probable that the Proceedings in those Cases begat this Error.

And for these Reasons in Easter Term of 6 Willielmi & Mariae the Judgment was reversed, which Reversal was afterwards in Hillary Term 7 Willielmi affirmed in Parliament. Cases Adj. 186.

Harcourt *versus* Fox.

By the Statute 37 H. 8. cap. 1. 'tis enacted, That none shall be Custos Rotulorum but such who shall have a Bill signed by the King for the same, which shall be a Warrant for the Lord Chancellor or Keeper to put and continue him in the Commission to be Custos Rotulorum, until the King shall appoint another; and by this Statute the Custos hath Power to appoint the Clerk of the Peace, who may execute that Office by a Deputy to be approved by the Custos. Cases in Parliament, 158. 1 Show. 416.

By the Statute 3 & 4 Ed. 6. cap. 1. The Lord Chancellor or Keeper shall appoint the Custos Rotulorum in every County, &c. who may execute his Office by himself or Deputy.

By the Statute of 1 Willielmi & Mariae the Nominating and Appointing the Custos Rotulorum, shall be as directed by the Statute of 37 H. 8. and he is to appoint and nominate the Clerk of the Peace when void, &c. who may execute it by himself or Deputy for so long Time only as he shall demean himself well, &c.

If such Clerk shall misdemean himself, &c. the Justices in their Quarter Sessions upon Complaint to them in Writing, and upon Examination and Proof, may suspend or discharge him; and the Custos may appoint another residing within the County; and if the Custos neglect or refuse so to do before the next Sessions after such Refusal, then the Justices may at their Sessions appoint one.

The Custos shall not sell the Office of Clerk of the Peace upon Penalty of both being disabled to hold their respective Offices, and forfeiting double the Value of the Money so given and taken, to be recovered by him who will sue for the same by Action of Debt, &c. to his own Use, and the Clerk of the Peace before he enters upon his Office is to make Oath in open Sessions that he hath, nor will not pay any Money, or Reward for the same.

The foregoing Paragraphs are the Substance of the several Statutes relating to the Case following, viz.

An Indebitatus assumpsit was brought against the Defendant for receiving 40 s. fees belonging to the Office of the Clerk of the Peace of Middlesex.

Upon Non assumpsit pleaded the Jury found a special Verdict in which the aforesaid Statutes 37 H. 8. and 1 Willielmi, &c. were found.

Then they find that the Earl of Clare was Anno 1 Willielmi & Mariæ, constituted by the King and Queen to be Custos Rotulorum for that County, and that the Office of Clerk of the Peace, being void the said Earl did by a Writing under his Hand and Seal appoint the Plaintiff M^r. Harcourt to be Clerk for so long as he should demean himself well, &c. and that he was duly qualified, &c.

They find that in Anno 3 Willielmi & Mariæ, the said Custos was removed from his Office, and that William Earl of Bedford by Letters Patents, &c. was made Custos in his Room, who by writing under his Hand and Seal, did constitute the Defendant John Fox to be Clerk of the Peace of the said County, during the Time the Earl should enjoy the Office of Custos, and so as he well demean himself, &c. that he was likewise duly qualified, and that he took upon him the Execution of the said Office, and received the fees, &c.

The Question upon this special Verdict was, Whether the Plaintiff being Clerk of the Peace by John Earl of Clare, had a good

good Title to hold that Office during Life, or whether it was dependent upon the Custos and determined by his Removal?

And as to that it was considered how this Office stood at the Common Law before the making of those Statutes of H. 8. and Ed. 6. and how it stands at this Time upon the new Act of this King.

At the Common Law all Officers of Justice had Estates in their respective Offices during Life, and could not be removed but for Misdemeanors: So was the Clerk of the Crown in B. R. and in Chancery; so are the Clerks in the Exchequer and the Filacers of the Common Pleas; and in this respect, the Wisdom and Policy of the Law was very great, because when Men held their Offices for Life, it was an Encouragement to the faithful Execution of their Duties; it was then also they endeavoured to acquire Knowledge and Experience in their Employments, having a durable and fixed Estate therein, and not liable to be displaced at the Pleasure of those who put them in.

Now tho' it cannot be said that the Clerk of the Peace is an Officer at the Common Law, yet he shall have an Estate for Life in his Office, because of the Uniformity between him and Officers of superior Courts; for his being nominated by the Custos doth not make him dependent on that Officer any more than the Clerk of Assize, who is appointed by a Judge, but hath an Estate for Life, and no Dependence upon that Judge who made him.

Neither is the Clerk of the Peace a Clerk to the Custos, ^{12 R. 2. cap. 10.} but to the Justices in their Sessions; he hath his Fees and Wages allotted out of the fines and Amerciaments arising in their Courts, he is incorporated by a Statute; for in a ^{25 Eliz. cap. 13.} Robbery the Hundred shall be sued in his Name: In 2 H. 7. fol. 1. he is called Attornatus Domini Regis; he joins Issue upon Traverses; joins in Demurrers, and in many other Instances he is in the Court of Sessions as the Clerk of the Crown is in B. R.

Thus it stood before the making of the Statute of 37 H. 8. the Custos at that Time being entirely at the Nomination of the Lord Chancellor; but by that Law he is restrained sub modo; that is, he shall still make a Custos, but not without a Bill signed by the King, appointing the Person; and by this Statute the Clerk of the Peace was made dependent on the Custos, who could grant that Office but only to continue during the Time he was Custos; so that when he was removed, the other was determined.

But it was found by Experience to be very inconvenient, that upon every Death or Removal of a Custos, the King should be troubled by Petition to sign a Bill, &c. therefore

by the Statute of Ed. 6. the Custos is restored to his former Right, viz. to be appointed by the Lord Chancellor, as if that Act had never been made; but it doth not mention the Clerk of the Peace, so that he remained as before.

But then by the Statute of 1 W. & M. he is likewise restored to his former Right: for now the Statute of Ed. 6. is repealed, and the Custos is to be as directed by the Statute of H. 8. and so far 'tis a Reverter of that Law; but then it settles in what Manner he shall appoint a Clerk of the Peace, viz. Not for so long Time as he shall continue Custos; but for so long Time ONLY as the Clerk by him named shall behave himself well in the Office; and so far 'tis introductive of a new Law, or rather restoring the Clerk of the Peace to that antient Right which he had to this Office during his Life, before the making of any of these Statutes.

Now it seems that the Parliament intended him an Estate for Life; for the Words, viz. So long as he shall behave himself well, do naturally import as much: Besides, 'tis made unlawful to buy or sell this Office, and an Oath enjoined this Officer before he enters upon the Execution of it; the Meaning of which must be, that when he is in he hath an Estate for Life: For what Need is there of so much Care if he was to be removed at Pleasure, or had any Dependence upon the Custos?

And as to that 'tis plain, that by the frame and Penning of this Act he hath no Relation to or Dependence upon the Custos, when once he is in his Office; for his Misbehaviour is not to be punished by the Custos, but by the Justices, who may suspend or discharge him, which they could not do before this Act, for it was then wholly in the Power of the Custos: He is now to be resident in the County, which was not enjoined before; he may make a Deputy without the Approbation of the Custos, which he could not by the Statute of H. 8. so that now there is another sort of Power and Jurisdiction over him which was not before.

And as there is another Jurisdiction over him, so he hath another Interest vested in him by this new Law, which he had not by that Statute; for as to the Appointment to this Office both these Acts are penned alike, viz. it shall be by the Custos; but then the Act of H. 8. limits his Estate only, during the Continuance of the Custos in his Office; and this new Act leaves out that Clause, and limits it for so long Time only as he shall demean himself well: So that both these Laws are in the Affirmative, and because they both concern the same Office, and the latter is introductive of a
new

new Law, therefore that must be observed, and 'tis as absolute a Repeal of the former, as if there had been negative Words for that Purpose.

Lastly, to shew that the Clerk of the Peace hath no Manner of Dependence upon the Custos this new Statute provides, That upon the Neglect or Refusal of the Custos the greatest Part of the Justices in their Sessions shall appoint one: And if that be done as it may, then no Man will say, that such Clerk can depend upon the Custos: And if his Office shall continue during Life as it certainly will, what Reason can be shewn why one appointed by the Custos should not enjoy it in like Manner?

Econtra. Whateber the Common Law was in Relation to Offices and Officers, it can be nothing to this Purpose; for this Case depends only as the Law now stands upon the Penning of these several Statutes.

Justices of Peace were made by the Statute of 1 Ed. 3. 1 Ed 3. but that Office is not mentioned there, neither was there cap. 16. any such Officer in the succeeding Reign of R. 2. 'Tis very probable that the Custos himself was then the Clerk to the Justices, and afterwards when the Office of Custos came to be honorary, a more inferior Person was appointed to be their Clerk, and from that Time this Officer was called Clerk of the Peace, but still he was but as a Deputy or Servant to the Custos, and removable at his Pleasure, as the Custos himself was at the Pleasure of the Chancellor.

Afterwards some Chancellors did enlarge their Power by undertaking to make a Custos during Life, and he likewise did enlarge his Authority by appointing a Clerk of the Peace to hold that Office during Life: Complaint was made of this Matter to the Parliament of H. 8. and then in the 37th Year of his Reign this Law was made, which gives the Clerk of the Peace no longer Title to his Office, but at Will; it was to depend on the Custos, who likewise was to continue in his Office but till the King should appoint another.

It was not the Ignorance or Incapacity of the Clerk, of which the Complaint was in those Days; but only the Duration of his being an Officer; the Complaint was, That he had an Estate for Life, which was to pervert the old Institution, and therefore he was made to depend merely on the Custos.

In Ed. 6. Reign, part of the Statute of H. 8. was repealed, but that Parliament did not meddle with the Clerk of the

the Peace; he still remained as before; so that what Alteration is made relating to him must be by this new Law, or none at all.

It has been said that this Law of 1 W. & M. vests him with a new and more durable Estate than he had before, viz. by enlarging it to continue for so long Time only as he shall demean himself well.

But these Words cannot be construed to enlarge his Estate; they are rather restrictive, and are only to express what was implied before: For 'tis a Condition which the Law annexes to all Officers, that they shall behave themselves well in their respective Offices, or otherwise 'tis a Forfeiture.

The Custos is still to be removed at Pleasure: Now it it would be very absurd to say that the Person appointed by him to be Clerk of the Peace should have a more fixed and continuing Estate than he himself; so that by Reason of the Incapacity of the Grantor he cannot have an Estate for Life; for in Construction of Grants there is always a great Regard to be had to the Estate and Power of the Grantor: As, if a Tenant in Tail make a Lease for Life, it shall be intended for the Life of Tenant in Tail; but if a Tenant in Fee maketh a Lease for Life, it shall be for the Life of the Lessee; and the Reason is because of the different Capacities of those two Persons; for the one could make a Lease for no longer than his own Life, and the other may make a Lease for a longer Term.

If there had been any seeming Contradiction between these two Acts, then certainly the last would have repealed the other; but here is no such Thing: for by the Statute of H. 8. the Clerk of the Peace is to hold his Office no longer than the Custos continues to be so; and by this new Law he is to enjoy it for so long Time only as he shall demean himself well: Now there is no Contradiction in the Limitation of the Estate by both these Laws; for suppose it had been put all together in the same Act, viz. for so long Time as the Custos shall continue, and so long only as he demean himself well, this would have been very consistent.

Curia. As to the Beginning of this Office we are much in the Dark, for we can only make some probable Conjectures about it; and as to his Continuance in his Office, 'tis not to be collected out of any of the Law-books before the Statute of 37 H. 8.

'Tis plain, that it was not an Office Time immemorial because the Commission of the Peace is not so.

In 1 Ed. 3. Justices of the Peace were made, which at the Common Law were called Conservators, and the first Beginning

ning of a Custos was in the 34th Year of that King, and the Reason why he was then appointed, and not before, was, because the Justices could not then agree amongst themselves who should keep the Records; and upon Application made to the King concerning this Matter, he (to prevent all Disputes) appointed a fit Person to keep them, and gave him the Custody of the Records in every County; so that tho' legally they may be said to be in the Custody of the Justices of Peace, because all Writs of Error and Certiorari's are directed to them, yet they are actually in the Possession of the Custos.

Afterwards it became incident to the Office of the Lord Keeper to nominate the Custos Rotulorum; and then because of the Necessity of one to make Entries, and join Issues, the Custos appointed a Clerk for that Purpose, who is now called Clerk of the Peace; and this seems very agreeable to the Statute of W. 2. by which it appears that such Officers and Clerks who are to enter and enroll Pleas, were always appointed by the Judge or chief Minister of the same Court.

W. 2. cap. 30.
2 Inst. 425.

Then as to the Case in Question, viz. By the Statute of 1 W. & M. the Custos hath Power to appoint a Person to execute this Office by himself or Deputy, for so long time ONLY as he shall demean himself well, &c. which Words do plainly import an Estate for Life; and the Case would have been the same if the Word ONLY had been left out; for if the Power is given to a Tenant for Life to make a Lease for 21 Years only, this would signify for so many Years absolutely.

If this Clause hath not a Construction to give him an Estate for Life, it signifies nothing; for if the Case is taken to be no otherwise then as it stood upon the Statute of 37 H. 8. then this Clause is of no Use; but 'tis plain that the Words in that Act relating to this Matter are omitted in this new Law, viz. That he shall continue so long as the other is Custos; and a better and more fixed Estate is given, viz. quam diu se bene gesserit, &c.

The Statute of 1 W. & M. revives that of H. 8. as to the Nomination of a Custos, but makes several Alterations from it when it mentions the Clerk of the Peace, as has been well observed at the Bar; so that the Design of this later Act was to abridge the Power of the Custos, and enlarge the Estate of the Clerk, and so to settle him therein that he might go on cheerfully in his Business: For when places depend upon Contingencies, it occasions Imbezilling Records and Neglect in Offices, and for this Reason my Ld.

Hobart

Hob. 153. Hobart was of Opinion, that the Chief Justice cannot grant these Offices which are in his Gift for less Time than for Life.

Therefore the Clerk of the Peace being in this Office by Vertue of this Act, for so long Time as he shall demean himself well; those Words shall be construed most favourably to answer the Intent of the Law-makers, whose Design was to have the Office well supplied by a Man able and well skilled in the Laws, which will be effected when the Officer hath an Estate for Life; and for these Reasons Judgment was given in Trinity Term following for the Plaintiff, and afterwards affirmed in Parliament.

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Term. Sanct. Pasch.

Anno 5 Gulielmi & Mariæ Regis & Regina in Banco Regis, 1693.

Hill *versus* Gallop.

THE Plaintiff brought an Action on the Case for a Disturbance in a Common, and declared, That he was possessed of a Messuage and so many Acres of Land with the Appurtenances in, &c. for a certain Term of Years, yet to come and unexpired, and that per totum idem tempus habuisset & gaudere debuisset communiam pasturæ pro omnibus averiis levan. & cuban. &c.

Upon Not guilty pleaded, the Cause was at Issue, and the Plaintiff had a Verdict, and Serj. Tremaine moved in Arrest of Judgment, because the Plaintiff had not shewn any Title in himself, either by Grant or Prescription, Sed non allocatur.

Chief Justice. This might be a good Exception upon a Demurrer, but 'tis cured by a Verdict.

Sands

Sands *versus* Child.

Trin. 4 Willielmi, Rot. 129.

13 R. 2. 2 H. 4. 2 H. 4. 2 H. 4. Lev. 351.

13 R. 2.
cap 5.2 H. 4.
cap. 11.

Error of a Judgment in the Common Bench in an Action on the Case brought by the Plaintiff Sands, for prosecuting of him in the Admiralty contrary to an Act of Parliament; in which there was a special Verdict found, and Judgment for the Plaintiff, and Damages to 1500 l.

The Case upon the Pleadings was, viz. The Declaration sets forth the Statute of 13 R. 2 That the Admiralty and their Deputies shall not meddle with any Thing, but what is done upon the Sea, &c. then it recites the Statute of 2 H. 4. which takes Notice of the former Act, and ordains, That the Common Law shall be put in Execution against Prosecutors in the Admiralty by an Action on the Case, and the Party grieved shall recover double Damages, and the Prosecutor being attainted, shall forfeit 10 l. to the King.

That on the 13th Day of December, 34 Car. 2. M^r. Sands was going to the Maderas in the Ship called the Expectation laden with divers Goods to trade there, and being about to sail, the now Plaintiff Child did cause a Plaint to be levied against him in the Admiralty-Court, and thereupon Process did issue out of the said Court to stop the said Ship from a Voyage to Infidels without the King's License, and the Ship was arrested till M^r. Sands should give Security that he would not sail into any part of the Limits of the East-India Company, which he refused to do.

They find that King Charles II. did grant to the Governor and Company of East-India, &c. a Patent, by which they were incorporated, and had the whole Trade to the Indies, prohibiting all other Persons to trade within their Limits, and the Places in the said Patent contained, upon the forfeiture of Ship and Goods: That M^r. Sands had prepared this Ship to sail for the Maderas, and from thence to a certain Place in the Indies, within the Limits of the Company, to trade with the Infidels, to prevent which, the Plaintiff Child and others delivered a Petition to the King in Council (which was found in hæc verba) praying that the Ship might be stayed till Security was given not to trade within the Limits of the Company; and thereupon an * Order of Council was made, directing the Court of Admiralty to issue out Process against the Ship till Security should be given to the said Court that the

Raym. 489.

Ship shall not trade with Infidels within the Limits of the Charter, and that the Plaintiff Child, and Leech as Agent to the Company, did obtain a Warrant upon this Order against the Ship, by Force whereof she was stopped.

There was a Judgment for the Plaintiff Sands in the C. B. and Damages in duplo to 1500 l. and a Writ of Error now brought, and the Error assigned was in point of the Judgment given, viz. Whether the Matter upon the whole Record is sufficient to charge the Defendant Child? And as to that the Argument was upon these two Points;

(1.) That what was done by him was lawful.

(2.) That he hath not incurred the Penalty of the Statute, because this was not a Prosecution within the Meaning thereof.

As to the first Point, it will not be denied, but that the King by his Prerogative may stop the Ship of any Subject, and shut up the Ports of the Kingdom at his Pleasure, especially where the Safety of the Nation is concerned, viz. in Time of an imminent Danger; this is confirmed by daily Experience of Embargo's laid on outward-bound Ships.

And as he may stop Ships, so he may restrain the Persons of his Subjects from departing the Kingdom lest they should assist his Enemies; and for this Purpose was the Writ Ne exeat regno framed: And after such an express Prohibition, 'tis a Contempt of the King's Authority to depart out of the Realm, and finable by Law.

Dyer. 165. b.
296. a.

Now to prevent such Departure of Ships the Method is, and always hath been, to inform the King of the Matter by Petition, who thereupon usually directs his Advocate or Proctor to require Caution that the Master shall not trade with Infidels, who are perpetui inimici, and thereupon Process issues out of the Admiralty, and the Ship is arrested; and this is in Conformity to the Common Law of the Land, as may appear by the Writ de securitate inveniendi quod se non divertat ad partes externas sine licentia Regis; and my Lord Coke hath affirmed that he had seen such a Licence in the Time of Edward III.

F. N. B. 95.
Dyer 296. a.

(2) This is not a Prosecution intended by either of the aforesaid Acts which restrain the Jurisdiction of the Admiral; and this will appear, if it be considered upon what Complaints and Petitions those Laws were made.

For the Statute of 13 R. 2. was made upon the Petition of several Lords of Franchises complaining that the Admirals and their Deputies had kept their Sessions within their Liberties, and so had encroached upon their Rights.

The other Statute of 15. R. 2. was made upon the like Complaint; but then also divers Cities and Burroughs petitioned against the Encroachment of the Admirals, by holding Pleas of Contracts, Wrecks, Nusances, &c. and for summoning of People at great Charge and Expence to attend their Courts at London, and imprisoning them upon Refusal.

Now the Cause for which this Ship was stopped, was not for doing any Thing prohibited by either of these Statutes, or for any Thing contained in the Petition upon which the Order was made; 'tis only that the People should not trade with Infidels without the King's Licence, lest they should decline from their Faith and Religion; so that it was not for doing any Thing, but only a Caution to prevent a Thing from being done.

Then as to the Statute of 2 H. 4. which gives an Action on the Case to the Party grieved by a Prosecution in the Admiralty; the Meaning must be, when he is grieved by a vexatious Suit brought in their Court to abridge the Power of the Courts at the Common Law, which was not done by the Defendant, because the Court of Admiralty had a Jurisdiction over this Matter.

Besides, this last Statute which gives the Action against the Prosecutor in the Admiralty, doth likewise give the King 10 l. upon his Attainder: But this Proceeding being by Order from the King himself in Council, it can never be intended that he shall have any forfeiture for a Prosecution made by his express Direction, which is a Reason why this is not such a Prosecution as is intended by the Act.

But really this was no Suit at all; for there was neither Plaintiff or Defendant, or any Thing in Demand; here was no Libel on which to ground a Prohibition, and so by Consequence no Cause for an Action against the Plaintiffs in Error, who were only Agents to the East India Company; so that if an Action must be brought, it ought not to be by Mr. Sands alone without his Partners, and it ought to be against the Company; for these Persons only as their Agents petitioned the King in Council, and required Caution, &c. the King directed the Method; so that if this is a Suit, and if 'tis a Prosecution, it was for the Benefit of the Company, And the Action ought to be brought against them, and it being upon a Penal Law ought not by Equity to be

Godb. 385.
1 Roll. Abr.
29.

extended to the Agents; for they are not to be punished by such a Law, unless named; and therefore in the Statute of Præmunire and other Statutes they are expressly named. 16 R. 2.

Econtra. (1.) The Stopping of this Ship was illegal.

At the Common Law no Man is prohibited to travel out of the Realm; the Seas are open, and he might go whither he would, without any Restraint upon his Person or Goods, whether he traded with Infidels or not; and this appears by the Statute of 26 H. 8. cap. 10. which gave the King Power (during his Life) to restrain Trading beyond Sea, to particular Places; which had been to little purpose, if he could have done it by his Letters Patents without the Help of an Act of Parliament; and the Common Law being restored by the Expiration of that Act, no force or Restraint can now be put upon any Man's Property without a Breach of the Peace. Lit. Red. 27.
Noy 182.

No Inference can be made from Embargo's, or from the Writ Ne exeat regno, to extenuate what was done in this Case; for the one is never laid upon Ships but in Time of War; 'tis a Prohibition of State by Advice of the Council, and not at the Prosecution of Parties, as this was, under the Pretence of Trading to Infidels; for both Mr. Sands and his Ship's-Crew might have gone to any Infidels, so that they would refrain from those of the Company. 2 Inst. 54.

Then as to the Writ Ne exeat regno, 'tis only granted, and that very rarely too, upon particular Reasons, and for particular Purposes, to prohibit a single Person from departing the Kingdom, and not so many Men as were going this Voyage to trade beyond the Seas.

(2.) The Defendant in this Action might as well have impounded a Man's Cattle till he give Security not to commit a Trespass; he might as well have levied Money before Judgment, or seized before a Trial or Conviction, which is very like this Case, so that what he did cannot be lawful; and the finding of the Charter is not material, for if by that they had any Power to stop the Ship, then there had been no need of petitioning the Council.

Neither can it be doubted whether this is a prosecution within the Meaning of the Act, for the Preferring of a Petition was intermedling with a Thing not done upon the high Sea; there was an Advocate and Proctor; there was an Allegation and Surmise of the Matter of Complaint; then a Prayer that the Court would make a Decree against the Ship; then there was a Judgment and

a Warrant upon it, which was executed; and can it be doubted, after all this, whether it was a Judicial Prosecution or not?

Hob. 212.

But a Prosecution it is, and that which is within the Meaning of the Statute; for the Arresting of the Ship *infra corpus Comitatus*, where the Admiral can have no Jurisdiction, is such a Prosecution as 'tis clearly against the Statute; for the Property of Goods, tho confiscated, shall not be tried by him, but by the Common Law; and therefore Cornero a Spaniard having committed several Crimes in Spain, by which he had incurred the Forfeiture of his Goods, brought them into England, and sold them to Sir John Watts, against whom Don Alonso de Velasco libelled in the Admiralty, and prayed an Attachment of the Goods in the Hands of Sir John; but a Prohibition was granted.

'Tis a weak Objection to say that this cannot be a Prosecution, because there was no Defendant; for the Proceedings in the Court of Admiralty are against the Ship, and the Owners usually come in *pro interesse suo*; and 'tis yet a weaker Objection that Mr. Sands is not a Party grieved, for the Damages are direct, and not consequential; the Taking of the Ship out of his Possession is the Cause of the Action; neither are all consequential Damages rejected by the Law, but such only which are far off, and such of which there is no Certainty whether they may happen or not.

Lastly, Mr. Sands alone may bring this Action, because he had the Ship in his Possession, and therefore was the Principal; and tho the Property of the Goods was in several Men, yet none had a Right to the Ship besides himself: 'Tis true Merchants have a several Interest in their Goods, and may therefore have several Remedies, but the Master alone hath a Right to the Ship.

1 & 2 Phil.
& Ma. c. 12.

By the Statute of 1 & 2 of Philip and Mary the Penalty of 5 l. is given where a Distress is taken, and driven above three Miles out of the Hundred; if the Cattle of three Men are distrained, and drove out of the Hundred, &c. each of them shall have an Action for 5 l.

Dyer 159. b.

The Case of Dominio Bylota doth something resemble this, viz. Two Men bought a Ship of him at Land, and sued him upon the Contract in the Admiralty Court, and for this Offence he brought an Action against one alone, and it was held good; but that of Swanton and Willett there cited, is directly to the Point, which was viz. Two Men sued in the Admiralty for a Cause arising at Land, the King and one

one of the Persons grieved brought an Action against one of the Prosecutors, without shewing the Death of his Companion; and the Judgment was, that the Party grieved recuperet dampnum & quod Defend. poenam 10. erga Regem per Statut. prædict. incurrat & capiatur, & quod Dominus Rex recuperet versus Defend' 10. l. & capiatur. In which Case both the Costs and Damages are doubled. 1 Leon. 282.
8 Rep. 115.
6 Cro. 582.

But 'tis in no sort like the Case lately adjudged in the B. R. between * Boson and Standford, which was this; an Action was brought against the Defendant, for that he and seven other Persons were Proprietors of a Vessel which used to carry Goods for Hire, and that the Plaintiffs Goods were dampnified by the Negligence of the Defendant, who was one of the Proprietors, against whom alone the Action was brought: There it was held, that tho' there was no actual Contract between the Plaintiff and the Part-owners, yet they all having an equal Benefit, and the Ground of the Action arising upon a Trust which supposes a Contract, the Action ought not to be brought against one, but all. * 3 Mod. 321.

But this Action arises upon a Trespass, and not upon a Contract, in which one may sue alone without joyning of his Partners, and in which consequential Damages may be given, as loss of Time, &c. As, if an Action of Battery should be brought for Breaking of a Leg, 'tis not necessary to give in Evidence that the Party cannot go, because 'tis the Consequence of breaking; therefore such Damages which were given here, are of immediate Consequence, and within the Statute, for which the Party ought to be relieved, as well as for the Taking of the Ship.

Then as to the Action being brought against the Agents, and not against the Company, 'tis well enough, because 'tis impossible to sue the Company; for it doth not appear that they were concerned in this Prosecution, or that it was done by their Order. And tho' they acted as Agents or Attornies, yet they must take Care to do what is lawful; and here even the Company it self could not justify this Prosecution, neither shall their Attorney or Agent.

Afterwards in Michaelmas Term the Judgment was affirmed: But per Curiam, the Partners ought to have been joyned with the Plaintiff in this Action; which not being done, the Defendant might have pleaded it in Abatement, and averred that they were living at the Time of the Action brought, which had been a good Plea; but this likewise was omitted, and therefore the Plaintiff had his Judgment.

Hinks

Hinks *versus* Harris.* 7 Rep.
44. b.

The Defendant married one Sister, who died, and afterwards he married the other, by whom he had Issue; he was prosecuted in the Arch-Deacons Court of Litchfield for an Incestuous Marriage; pending that Suit his second Wife also died, so that according to * Kenn's Case, all Prosecution in the Ecclesiastical Court ought to cease; for after the Death of either of the Parties before a Divorce, they cannot proceed there to declare the Marriage void, and bastardize the Issue.

But notwithstanding that Authority, Sentence was given in this Case declaring the Marriage to be void; and upon a Motion in B. R. for a Prohibition, Cause was shewed why it should not go, viz. because this was an Offence of Ecclesiastical Cognizance, and that Court had the proper Jurisdiction over it.

Kenn's Case is, That no Proceedings shall be in order to a Divorce, where both Parties are dead; but here is one living who may defend the Suit.

Econtra. There is no Occasion for a Divorce when the Death of one of the Parties hath determined the Marriage; but the Consequence of this Proceeding is to bastardize the Issue.

The Incest may still be determinable in that Court, but then the Marriage must not be declared void; let the Party be punished if the Marriage was incestuous, but quoad the Sentence of Divorce a Prohibition was prayed, which was granted nisi.

Dixon *versus* Terry.

Hill. 4 Rot. 848.

Owen 50.

In Trespass, Assault and Battery the Defendant pleaded a General Release of all Actions, &c. from the Beginning of the World usque ad diem datus of the said Release; and it happened that the Battery was done upon that very Day in which the Release was dated, so that it was held that this Action was not discharged, for the Release did not include that Day: The Defendant should have traversed all, &c. after the Day of the Date of the Release.

De la Bastide *versus* Reynell & Ux'.

UPON a Writ de homine replegiando, the Sherif returned elongavit; thereupon a Capias in Withernam issued forth; then the Defendants entred an Appearance with the Philazer, and a Motion was made for a Superedeas to the Withernam, and that they would plead non ceperunt; for they are not to be concluded by the Return of the Sherif, which was traversable.

This was opposed, unless they would give Bail to deliver the Person in Case the Issue should be found against them.

Curia. There is no Difference between a common Replevin and an Homine replegiando as to this matter; neither is there any other Return to this Writ than Elongavit, which is, that the Party cannot be found.

If the Defendants had claimed any Property, then they are to gage deliverance; but that is not done, for they say they have not the Person, therefore let them plead non ceperunt, and put in Bail to appear de die in diem.

Wharton *versus* Lisle.

Hill. 3. Rot. 56.

TROVER and Conversion for taking of 20 Cart-Loads of 3 Lev. 365.
Flax, Oats and Wheat, &c.

Upon not guilty pleaded, the Jury find as to the Oats and Wheat, Not guilty; and as to the Flax they find specially, viz. That the Plaintiff was Impropriator of the Parish Church of Thorp in the County of Essex, and that all great Tithes arising there have been usually paid to him; that the Defendant was Vicar there, and had all the small Tithes in the said Parish; that in the year 1691. there were 850. Acres of arable Land sown in the said Parish with all sorts of Grain, whereof 20 Acres were sown with Flax, that on the 5th of June 3 Wilhelmi the Lands being so sown, and the Tithes set out, the Defendant carried them away, &c.

The Question was; Whether the Tithes of Flax were great or small Tithes?

Serjeant

W. 2. c. 5.
14 Ed. 3. c. 7.
2 Roll. Rep.
97.

Serjeant Rotheram for the Plaintiff, That these are great Tithes. At the Common Law there is no such Person known as a Vicar, the Parson had all the Tithes, and Vicaridges began in the Reign of H. 3. by a Constitution of Pope Urban the Eighth, and afterwards the Vicars became Spiritual Persons; and before the Statute of W. 2. a Quare impedit would not lie for disturbing of a Patron to present to a Vicaridge; and till the Statute of 14 E. 3. a Vicar could not maintain a Juris utrum against the Patron.

15 R. 2. c. 6.
4 H. 4 c. 12.

When he is entitled to Tithes, it must be by Endowment or Prescription; it cannot be by Endowment in this Case, because the Jury have not found it so: Besides, Flax was not sown in England at the Time when the first Statutes were made for Endowing of Vicaridges.

Neither can this Vicar prescribe to have these Tithes, because the Parson had them one Year, and the Vicar for 7 Years past.

Now admitting that the Tithes of Flax are in themselves minuta decimæ, yet when 'tis sown in great fields, and in large Quantities, it loses that Quality, and labours of the Nature of great Tithes.

1 Roll. Abr.
643.

Econtra. Flax is an Herb in its Nature, and so it was adjudged in Noah Webb's Case.

Cro. Car. 28.

The Quantity of Land on which 'tis sown, cannot alter the Nature of the Thing either to make it great or small Tithes; for if a whole field should be sown with Saffron, the Tithes thereof would be but minuta decimæ, for it grows in the Nature of an Herb, and 'tis that which together with Custom and Usage, and not by the Husbandry of the Land, makes it small Tithes.

Dolben Justice. If Wheat is sown in a Garden the Parson shall have Tithes, and not the Vicar; and if Flax is sowed in a field, the Vicar shall have the Tithes, because of the Nature of the Thing, quod fuit negatum per alios; for Pease and Beans when sown in a Garden, yield only small Tithes, but when in large fields 'tis otherwise; and upon this Difference, viz. when a little Land, or great part of a Parish is sown with things of this Nature, the Tithes from thence arising are either great or small; and 'tis upon this Reason that Hops in Kent have altered the Quality of the Thing, because they are planted there in great Quantities.

Afterwards in Trinity Term Judgment was given for the Defendant by three Judges, absente C. J. who was of Opinion, that the Sowing of Flax in large fields, makes the Tithes thereof great Tithes.

Barksdale *versus* Morgan.
In the Common Pleas.

In Covenant a special Verdict was found in which the Case was as followeth, viz.

In Consideration of 20 Guineas paid by the Plaintiff to the Defendant on such a Day, &c. he did covenant, &c. upon Payment of 500 l. more within one Month next following, upon Notice to transfer to him certain Shares in the East-India Company, and the Plaintiff did aver that he did tender the 500 l. within a Month, &c.

The Defendant pleaded, that the Plaintiff did not tender the 500 l. within a Month, for that before such Tender 28 Days were past from the Day of the Date of the Agreement.

The Truth was, he did tender the 500 l. after the 28 Days, but within a Calendar Month, and it was so found by the Jury; so that the Question was, What shall be intended a Month within this Agreement?

Those who argued for a Kalendar Month, insisted, that the Statute of H. 4. gives the Justices Power within one Month next after a Riot committed, to enquire into the same, and that it hath been held they may make such Enquiry after the 28 Days; which shews that the Parliament intended a Kalendar Month.

And as such a Month was intended by them, so this Court may judicially take Notice of such a Month; and therefore a Judgment being obtained in an inferior Court, the Error assigned was, that it was given at a Court held on the 16th Day of February, which was Sunday, and the Question being, Whether this Matter should be tried by a Jury, or by the Almanacks of the Year? it was held sufficient to examine it by Almanacks; and the Court was informed by them.

Econtra. viz. The Words in this Agreement, viz. to pay 500 l. within a Month next following, shall be accounted the next, or nearest Time to the Day of the Agreement, which must be 28 Days.

So it is in a Bond dated primo Maii, with a Condition to pay Money on the 15th Day of May next ensuing; these last Words shall refer to the 15th Day of the same Month, and not to the Month it self, which would be a Year afterwards, and regularly a Month is accounted no more than

13 H. 4. ca. 7.

Sid. 186.

Cro. Eliz.

227.

1 Leon. 242.

Id.

2 Cro. 646.

1 Inst. 135.

Yelv. 100

2 Cro. 166.

than 28 Days, unless 'tis in a Quare Impedit, and there a few Days more are allowed on purpose to save a Lapse.

Dyer 142. a. 'Tis likewise so in a Lease rendring Rent at the two most usual feasts in the Year, or within a Month after; and if 'tis behind by the Space of eight Weeks, then, &c. these eight Weeks shall be reckoned according to 28 Days.

Cro. Eliz.
219.

Curia. In common Parlane the Month is taken to be 28 Days in all Cases but in a Quare Impedit, and therefore it must be so many Days according to the common and known Acceptation of the Word; and to prove this some Cases were offered, viz. If I promise to deliver an Indenture before the End of Trinity Term next ensuing, and this Promise happens to be made on the 5th. of June the Term began two Days after, but the Escoin-day was two Days before the Promise made; now tho' that Day in Law is the first Day of the Term, and so the Delivery of the Indenture was not to be till Trinity Term a Year afterwards, yet in common Speech the first Day of the Term is when the Judges sit, and so the Delivery of the Indenture was adjudged to be made that very Trinity Term in which the Promise was made.

And as Words and Phrases of Speech are to be expounded and construed as they are generally understood, so 'tis likewise in particular Places; and therefore if I covenant to convey to another an Acre of Land in Cornwall, the common Acceptation of the Word Acre there amounts to as much as an hundred of other Counties; so a Perch in Staffordshire is as much as twenty Perches in some other Places, therefore such Words must be governed by the common and known Acceptation of the People.

Lit. Rep. 19.
Cro. Eliz.
835.
2 Cro. 529.
Manw. Forest Law 92.

By the Statute of 2 Ed. 6. the Suggestion on a Prohibition ought to be proved within six Months next after the Prohibition granted, the Computation must be after the Rate of 28 Days to the Month; and so it was held in this Case.

Smith *versus* Kemp.

2 Salk. 637.

T Respass was brought against the Defendant, who was the Owner of the Soil, quare vi & armis clausum ipsius (the Plaintiff) fregit & intravit & liberam piscariam piscatus fuit, & pisces retibus cepit, &c.

There was a Verdict for the Plaintiff and a Motion was made in Arrest of Judgment, and these Exceptions taken.

(1.) That an Action of Trespass, quare vi & armis, &c. would not lie against the Owner of the Soil.

(2.) It doth not lie for taking fishes in Libera Piscaria.

First, It was compared to a free Warren in the Soil of another, quare vi & armis in libera warrena sua latibula ejusdem ^{2 Roll. Abt.} warrenæ prostravit will not lie: The proper Remedy is a ^{550.} Special Action on the Case for the Wrong done, and so it ought to have been here.

2. To fish in libera piscaria is the same Thing as to fish in Communi Piscaria; and a Commoner cannot bring an Action of Trespass for any Trespass done upon the Common.

Curia. In 46 E. 3. the like Action was brought for fishing in libera Piscaria; and it doth not appear by the Book but the Action was maintainable; but if 'tis a fault, 'tis ^{46 Ed. 3. 111.} cured by the Clerdict; and it shall now be intended that they were the Plaintiff's own fish.

Bowden *versus* Shaw.

TWYford was indebted to the Plaintiff Bowden in 70 l. for which he was arrested, and being in Custody of Ashby, a Serjeant of the Mace in London, was discharged at the Instance of the Defendant Shaw, by giving a Bond to the said Ashby for the Use of the Plaintiff; That Twiford should either render himself, or put in Bail at the Return of the Writ, or pay the Plaintiff 70 l. which not being done, the Plaintiff now brought an Action of Debt against Shaw upon this Bond.

The Defendant pleaded, That the Officer took the Bond colore officii, absq; hoc, &c. That Tywford was at large at that Time; and upon a Demurrer it was said, this was an immaterial Traverse.

But admitting it to be so, the Plaintiff shall take no Advantage of it upon a general Demurrer; he ought to have demurred specially, and shewed it for Cause.

Then as to the Matter it was held, That the Officer having taken such a Bond to enlarge a Person without the Privilege of the Plaintiff, who had Power either to confine or let him go, 'tis void; and tho it be taken to his Use, 'tis ^{Cro Eliz.} within 19^a

within the Equity of the Statute; but it might be otherwise if the Bond had been made to the Plaintiff himself.

Knight *versus* Keech.

Pasch. 3 Willielmi, Rot. 374.

3 Lev. 319.

THE Case was, viz. There were mutual Promises and Agreements between the Plaintiff and Defendant, which were specially set forth in the Declaration, in which the Plaintiff alledged generally that the Defendant non performavit agreementum suum prædictum, without shewing a particular Breach.

There was a Verdict and Judgment for the Plaintiff in the Common Pleas, and now a Writ of Error brought, and it was assigned for Error that the Breach was too general, which being Matter of Substance the Right of the Action could not be tried; and therefore 'tis not within any of the Statutes of Jeofails; and to prove this many Cases were cited, which resembled this, viz. That non performavit agreementum could not be good without shewing wherein.

Cro. Eliz.
192.

As in Consideration that he would relinquish Rent due, a Promise was made to pay 30 l. And an Allegation in fact that he did relinquish the Rent, but because he did not shew how, the Judgment was arrested.

Hob. 57.

So where a Horse was bought for a Piece of Gold in Hand, and 11 l. more to be paid at the Death or Marriage of the Plaintiff; for which he was to be bound with sufficient Sureties; and thereupon the Defendant promised to deliver the Horse; the Plaintiff offered to be bound, but because he did not aver that he tendered a Bond ready sealed, &c. that so it might appear that both he and his Sureties were bound in a competent Sum, the Judgment was likewise arrested.

3 Cro. 503.

Many more Instances may be given where the Plaintiff must shew the precise Consideration agreed on to be performed: as, if a Promise should be made, that in case the Plaintiff would acquit a Man of 100 l. due, the Defendant promised to pay the Money: Now tho' he alledged in fact that he did acquit him, 'tis not sufficient without shewing how.

So a Promise to pay Money before the Plaintiff began his next Journey to London, and he alledged, That he began his Journey on such a Day; but because he did not aver that to be the next Journey after the Promise, nil capiat per billam.

Econtra. There is no Form in the Register prescribed to an Action on the Case; for if there is sufficient Matter disclosed in the Declaration, to which the Defendant ought to answer, 'tis well enough.

This is a Negative, viz. Non performavit; and so not like those Cases of affirmative Promises or Covenants where the Breach must be averred: Besides, in this Case the Plaintiff could not have a Verdict, if the Non-performance of the Agreement had not been fully proved.

Goods were delivered to a Person, and the Defendant promised that he would Warrant all the Money that was owing for them; the Breach was for Non-payment of the Money; and although it was objected it should be for not warranting, yet it was held well enough. Sid. 178.

Likewise if a Promise is of 1000 l. to save another harmless from an Escape, the Breach assigned was for not saving harmless, which is the Gift of the Action, without saying that he had not paid the 1000 l.

At another Day the Judgment was affirmed upon these Authorities following, viz.

In 3 H. 6. 8. Debt was brought upon a Lease, in which the Defendant was bound to perform several Covenants, or otherwise to forfeit so much, &c. the Breach assigned was, That he had broke all the Covenants, and did not shew any particular Breach, which is a harder Case than this, and yet it was held good. Dyer 297. b.

If Promises are executory on both sides, Performance need not be averred, because 'tis the Counter-promise and not the Performance that raises the Consideration; and therefore where the Plaintiff promised to deliver a Cow to the Defendant, and he promised to pay him 50 s. the Plaintiff need not aver the Delivery of the Cow, because without such Averment a Promise against a Promise made at one and the same Time is a sufficient Ground for an Action. Hob. 88. 106. Cro. Eliz. 543.

And for a latter Authority this Case was remembred, viz. 2Saund. 351. There was an Agreement between the Plaintiff and Defendant, That the Plaintiff should pull down old Walls, and build a Malt-house, and that the Defendant would pay him 8 l. pro labore suo; The Plaintiff averred, that after the Agreement, paratus fuit & obrulit performare, &c. he had a Verdict, and this was held good enough after a Verdict, without averring Performance of the Work.

And therefore upon these Authorities, and for that the Promises in this Case were mutual, the Breach was held to be well assigned, and thereupon Judgment was given for the Plaintiff.

The

The King and Queen *versus* Bishop of London
and Dr. Lancaster.

*Middle-
sex ff.*

*Quare
impedit.*

*The late
Bishop of
London
seized,
Ut de
uno gros-
so jure
Episco-
patus.*

*And col-
lated.*

Henricus Episcopus Lon-
don & Willielmus Lan-
caster sacre Theologie Pro-
fessor summoniti fuer. ad re-
spondend. Dno. Regi & Dnæ.
Reginæ nunc de placito quod
permittant ipsos Dominum Re-
gem & Dnam. Reginam præ-
sentare idoneam personam ad
vicariam Ecclesiæ Sancti Mar-
tini in Campis quæ vacat &
ad suam spectat donationem
&c. Et unde Johannes Som-
mers Miles Attorn. dictorum
Dni. Reg. & Dnæ. Reginæ
nunc Generalis qui pro eisd.
Dno. Rege & Dna. Regina se-
quitur pro eisdem Dno. Rege
& Domina Regina dicit quod
quidam Humfridus nuper Episc.
London fuit seisit. de advoca-
tione vicariæ Ecclesiæ paroch.
Sancti Martini in Campis præd.
ut de uno grosso per se ut de
feodo & jure in jure Episcop.
sui prædict. Et sic inde seisit.
existen. ipse prædict. nuper E-
piscopus eo quod eadem vica-
ria fuit in Diocesi sua London
eandem vicariam vacantem
contulit Thomæ Lamplugh
Sacre Theologiæ professori
Clerico suo qui virtute Col-
lationis illius in corporal. pos-
session. ejusdem vicariæ posit.
fuit tempore pacis tempore
Domini Caroli Secundi nuper

Regis Angl. &c. eodemque
Thoma vicar. vicariæ præd.
ut prefertur existen. idem Tho-
mas Lamplugh postea in Epif-
copum Episcopatus Exon. rite
& canonice creat. & consecrat. *The Par-
son made
a Bishop.*
fuit & vicaria præd. vacavit
per promotionem dicti Tho-
mæ Lamplugh ad præd. Epif-
copat. Exon. per quod ad eun-
dem nuper Regem Carolum se-
cundum ratione prærogativæ
sue Regiæ Coronæ sue Angliæ
annex. idoneam personam ad
vicariam præd. sic vacantem
pertinuit præsentare per quod
præd. nuper Rex Carolus Se-
cundus ratione prærogativæ
sue Regiæ præd. ad vicariam
præd. tunc sic vacantem præ-
sentavit Willielmum Lloyd
Sacre Theologiæ professorem
Clericum suum qui ad eandem
præsentationem ipsius nuper
Regis fuit admissus institut. &
induct. in eadem tempore pa-
cis tempore dicti nuper Regis
eodemque Willielmo Lloyd vi-
cario vicariæ præd. ut præfer-
tur existen. idem Williel. Lloyd
postea in Episcopum Episcopat.
Asaphen. rite & canonice creat.
& consecrat. fuit & vicaria
præd. vacavit per promotio-
nem præd. Willielmi Lloyd
ad præd. Episcopat. Asaphen.
per quod ad eundem nu-
per *Which
Parson
presented
was after-
wards
made a
Bishop.*

per Regem Carolum Secundum ratione prerogativæ suæ Regiæ Coronæ suæ Angliæ annex. idoneam personam ad vicariam præd. sic vacantem pertinuit præsentare per quod præd. nuper Rex Carolus Secundus ratione prerogativæ suæ Regiæ præd. ad vicariam præd. sic tunc vacantem præsentavit Thomam Tennison Sacræ Theologiæ professorem clericum suum qui ad eandem præsentationem ipsius nuper Regis fuit admissus institut. & induct. in eadem tempore pacis tempore dicti nuper Regis eodemq; Thoma Tennison vicario vicariæ præd. ut prefertur existen. idem Thomas Tennison postea in Episcopum Episcop. Lincoln. rite & canonice creat. & consecrat. fuit & vicaria præd. vacavit per promotionem dicti Thomæ Tennison ad præd. Episcop. Lincoln. & adhuc vacans existit per quod ad ipsos Dominum Regem & Dominam Reginam nunc ratione prerogativæ suæ Regiæ prædictæ idoneam personam ad vicariam præd. sic vacantem ad præsens pertinet præsentare & prædict. Henricus Episcopus London & Willielmus Lancaster ipsos Dom. Regem & Dominam Reginam nunc injuste impediunt ad damnum ipsorum Dni. Regis & Dnæ. Reginæ nunc quingentarum librarum & hoc idem Attorn. dictorum Dni. Regis & Dnæ. Reginæ nunc Generalis

qui &c. pro eisdem Dno. Rege & Domina Regina parat. est verificare &c.

Et præd. Henricus Episcopus London & Willielmus Lancaster per Adam. Baynes Attorn. suum ven. & defend. vim & injur. &c. & petunt auditum brevis pred. & eis legitur in hæc verba scilicet Guilielmus & Maria Dei Gratia Angl. Scotiæ Franciæ & Hiberniæ Rex & Regina fidei defensor. &c. vic. Middlesex salut. præcipe Henrico Episc. London & Willielmo Lancaster Sacræ Theologiæ Professori quod juste & sine dilatione permittant nos præsentare idoneam personam ad vicariam Ecclesiæ Sancti Martini in Campis quæ vacat & ad nostram spectat donationem & unde præd. Episcopus & Willielmus nos injuste impediunt ut dicitur & nisi fecerint sum' per bonos sum. præd. Episcopum & Willielmum quod sint coram nobis a die Sancti Michaelis in tres septimanas ubicunq; tunc fuerimus in Angl. ostens. quare non fecerint & habeas ibi sum' & hoc breve Teste nobis ipsis apud Westm. 26 die Septembris Anno Regni nostri quarto Cæsar quo lecto & audito iidem Episcopus & Willielmus petunt judicium de brevi & narratione præd. quia dicunt quod inter breve & narration. pred. materialis habetur variatio in hoc videlicet

Placitum.

The Defendants pray Oyer of the Writ.

And the King presented another.

Who was instituted and inducted.

Which Person was afterwards made a Bishop.

And the King was hindered in his Presentation.

And plead a Variance between the Writ and Counts.

videlicet quod ubi per breve præd. prædicti Dominus Rex & Domina Regina intitulant se ad donationem præd. vicariæ Ecclesiæ Sancti Martini in Campis pleno jure tamen per narration. præd. iidem Dominus Rex & Domina Regina intitulant se ad donationem ejusdem vicariæ ratione prærogativæ suæ Regiæ Coronæ suæ Angliæ unde pro variatione præd. inter breve & narration. præd. iidem Episcopus & Willielmus petunt judicium de brevi & narration. præd. & quod breve ill' cassetur, &c.

Moratio
in lege
ad placitum.

Et præd. Attorn. dictorum Dni. Regis & Domine Regine nunc General. qui pro eisdem Domino Rege & Domina Regina nunc sequitur pro eisdem Domino Rege & Domina Regina dicit quod præd. placitum præd. Henrici Episcopi London & Willielmi Lancaster in cassatione brevis. præd. superius placitat. materiaq; in eodem content. minus sufficien. in lege existunt ad breve præd. cassand. quodq; ipse idem Attorn. general. &c. pro eisdem Domino Rege & Domina Regina ad placitum illud modo & forma præd. placitat. necesse non habet nec per legem terræ tenetur respondere & hoc idem Attorn. General. &c. pro eisdem Domino Rege & Dna. Regina parat. est verificare unde pro defectu sufficien. respons. ipsorum Episcopi & Willielmi in

hac parte idem Attorn. Generalis &c. pro eisdem Domino Rege & Domina Regina pet. judicium & quod breve præd. bonum adjudicetur & breve Episcopo &c.

Et præd. Henricus Episcopus London. & Willielmus Lancaster dicunt quod præd. placitum ipsorum Henrici Episcopi London & Willielmi Lancaster in cassation. brevis præd. superius placitat. materiaq; in eodem content. bonum & sufficien. in lege existunt ad breve præd. cassand. unde ex quo præd. Attorn. dict. Domini Regis & Domine Regine nunc General. ad placitum illud non respond. nec ill. aliquo modo deduc. iidem Henricus Episcopus London. & Willielmus Lancaster (ut prius) petunt judicium de brevi & narration. prædict. & quod breve illud cassetur &c. sed quia Curia dictorum Domini Regis & Domine Regine nunc hic de judicio suo de & super præmissis reddend. nondum advisatur dies indat. est tam præfat. Attorn. General. &c. quam præfat. Henrico Episcopo London & Willielmo Lancaster coram Domino Rege & Domina Regina usq; a die Paschæ in quinque septimanas ubicunq; &c. de judicio suo de & super præmissis ill. audiend. eo quod Curia dictorum Domini Regis & Domine Regine nunc hic inde nondum &c.

Junctio
in Moration.

&c. ad quem diem coram Domino Rege & Domina Regina apud Westm. ven. tam Edwardus Ward Ar. modo Attorn. Domini Regis & Dnæ. Reginae nunc general. qui pro eisdem Domino Rege & Domina Regina in hac parte sequitur in propria persona sua quam predict. Henricus Episcopus London & Willielmus Lancaster per Attorn. suum præd. super quo visis & per Curiam dict. Domini Regis & Domina Reginae nunc hic plenius intellectis omnibus & singulis præmissis maturaq; deliberatione inde habita pro eo quod videtur Curia dict. Domini Regis & Domina Reginae nunc hic qd. præd. placit. præd. Henr. Episc. Lond. & Willielmi Lancaster in cassation. brevis præd. superius placitat. materiaq; in eodem content. minus sufficiens. in lege existunt ad breve predict. cassand. consideratum est quod predict. Henricus Episcopus London & Willielmus Lancaster ad breve predict. respond. &c. super quo prædict. Henricus Episcopus London. & Willielmus Lancaster per prædict. Adam Baynes Attorn. suum ven. & defend. vim & injur. quando &c. & dicunt quod prædict. Dominus Rex & Domina Regina actionem suam præd. inde versus eos habere seu manutenere non debent quia idem Episcopus dicit quod narratio præd. materiaq; in eadem content. minus sufficiens. in lege

existunt ad ipsos Dominum Regem & Dominam Reginam ad actionem suam præd. inde versus ipsum Episcopum habend. manutenend. quodq; ipse ad narrationem præd. necesse non habet nec per legem terræ tenetur aliquo modo respondere & hoc parat. est verificare unde pro defectu sufficiens narrationis in hac parte idem Henricus Episcopus London petit iudicium & quod præd. Dominus Rex & Domina Regina ab actione sua præd. versus ipsum Episcopum habend. præcludantur, &c.

Et præd. Willielmus Lancaster dicit quod ipse est vicarius vicariæ Sancti Martini in Campis ex collatione præd. Henrici Episcopi London. quodq; dict. Dominus Rex & Domina Regina action. suam præd. inde versus eum habere non debent quia dicit quod bene & verum est quod præd. Humfridus nuper Episcopus London in narratione præd. nominat. fuit seifit. de advocacione vicariæ Ecclesiæ Parochialis Sancti Martini in Campis præd. ut de uno grosso per se ut de feodo & jure in jure Episcopat. sui præd. & sic inde seifit. existen. ipse præd. nuper Episcopus eo qd. eadem vicaria fuit in Diocesi sua London eandem vicariam vacan. contulit Thome Lamplugh Sacrae Theogloia professor. Clerico suo qui virtute collationis illius in corporal. pos-

L'autel
Defendant
pleads
Ousteri

Confess
the Seifit
of the late
Bishop.

And the
Collati-
on.

C c

session.

Judg-
ment
quod
Resp.
ouster.

Episco-
pus mo-
ratur in
lege ad
Narr.

*And the
making of
the Person
collated a
Bishop.*

*And the
King's
Presenta-
tion of the
others
with their
Institution
and In-
duction.*

session. ejusdem vicariæ posit. fuit tempore pacis tempore Domini Caroli Secundi nuper Regis Angliæ &c. eodemque Thoma vicar. Vicariæ præd. ut præfertur existen. idem Thomas Lamplugh postea in Episcopum Episcopat. Exon. rite & cannonice creat. & consecrat. fuit & vicaria præd. vacavit per promotionem dicti Thomæ Lamplugh ad præd. Episcopatum Exon. quodq; præd. nuper Rex Carolus Secundus ad vicariam præd. tunc sic vacan. præsentavit Willielmum Lloyd Sacræ Theologiæ professorem Clericum suum qui ad eandem præsentationem ipsius nuper Regis fuit admissus institut. & inductus in eandem tempore pacis tempore dicti nuper Regis eodemq; Willielmo Lloyd vicar. vicariæ prædict. ut præfertur existen. idem Willielmus Lloyd postea in Episcopum Episcopat. Asaphen. rite & cannonice creat. & consecrat. fuit & vicaria prædict. vacavit per promotionem præd. Willielmi Lloyd ad præd. Episcopat. Asaphen. quodq; præd. nuper Rex Carolus Secundus ad vicariam præd. sic tunc vacan. præsentavit Thomam Tennison Sacræ Theologiæ professorum Clericum suum qui ad eandem præsentationem ipsius nuper Regis fuit admissus institut. & inductus in eandem tempore pacis tempore dicti nuper Regis Caroli Secundi modo & forma prout per narra-

tion. præd. superius supponitur sed idem Willielmus ulterius dicit quod per quendam actum in Parlamento Domini Henrici nuper Regis Angliæ octavi apud Westm. præd. 15 die Januarii Anno Regni sui 25. tent. edit. inter alia inactitat. fuit autoritate ejusdem Parliamenti quod neque dictus nuper Rex hæredes neque Successores sui Reges hujus Regni nec aliquis subditus (Here recite the Statute of 25 H. 8. cap. 21. from the 3d to the 7th Paragraph) prout per eundem actum inter alia plenius apparet & idem Willielmus ulterius dicit quod post consecrationem Actus præd. & diu ante impetration. brevis Originalis præd. prædict Henr. modo Def. rite & cannonice creat. & consecrat fuit in Episcopum Episcopat. London. scilicet apud Westm. prædict. quodq; postea & ante impetration. ejusdem brevis scilicet 20 die Decembris Anno Dni. 1691. præd. Thomas Tennison rite & debito modo electus fuit in Episcopum Episcopat. Lincoln videlicet apud Westm. prædict. quodq; Johannes providentia divina Cantuar. Archiepiscopus totius Angliæ primas & metropolitan. post edition. actus prædict. & ante impetration. brevis prædict. scilicet 22 die Decembris Anno Domini ultimo supradicto post debitam examinationem per Archiepiscopum hic de causis & qualitatibus

*And
pleads
the Sta-
tute of
25 H. 8.*

*The Bi-
shop rite
& debite
Electus.*

A Dispensation by the Archbishop.

tibus præd. Episcopi Elect' per quasdam literas suas dispensation. script. secundum formam præd. statuti supra recitat. edit. sub nomine ipsius Archiepiscopi confect' ac sigillo ipsius Archiepiscopi sigillat. ac in Curia Cancellaria dictorum Regis & Reginae nunc apud Westm' præd' debito modo irrotulat' ac idem Thomas Tennison Sacrae Theologiae doctori & Episcopo Lincoln. elect' direct' recitan' per easdem literas dispensation' quod ex parte dict' Episcopi Lincoln' elect' dict' Archiepiscopo significat' fuit quod Episcopat. Lincoln præd' fructus redditus & proventus adeo tenues & exiles & diminut' fuer' ut dignitati suae Episcopali istis præsertim temporibus nullo modo sufficerent unde dictus Episcopus Lincoln elect' dicto Archiepiscopo humiliter supplicari fecisset quatenus ei de opportuno aliquo sublevamine in præmissis provideri dict' Archiepisc' de gratia sua speciali dignaretur petitioni præd' obsecundare volens cum præd. Thomas Tennison Episcopo Lincoln' elect' (juxta voluntatem Serenissimi Dni' nostri Regis Gulielmi dicto Archiepiscopo in hac parte significat') ut una cum Episcopat. Lincoln' vicariam perpetuam Ecclesiae paroch' sancti Martini in Campis & Rectoriam Ecclesiae parochialis Sancti Jacobi Westm' in Com. Middlesex & Dio-

ces. London quas tunc dictus Episcopus Lincoln' elect. possidebat usq; primum diem mensis Julii tunc prox' a dat. præd. literarum dispensation. retinere gaudere habere & in commetendam tenere in tam amplis modo & forma quibus antetunc usq; tempus confectio' literarum dispensation' præd' dictus Episcopus Lincoln. electus retinebat & possidebat eorumq; fructus proventus aliaq; proficua inde provenientia in ejus proprios usus & utilitates convertere applicare & de eisdem disponere dictus Episcopus Lincoln. elect. libere & licite valeret & posset etiam in dictis vicaria & Rectoria præd. non resideret nec ullam moram ibidem traxit legitimam dicto Thomae Tennison Sacrae Theologiae doctori Episcopo Lincoln. elect. facultatem & Authoritat. dedit & concessit (quantum in dicto Archiepiscopo fuit & jura Regni patiebantur) & tenore dictarum literarum dispensation. gratiose dispensavit canonicis institutis quibuscunq; in contrarium non obstan' proviso semper quod vicaria perpetua Ecclesiae parochialis sancti Martini in Camp. & Rectoria Ecclesiae paroch. Sancti Jacobi Westm. præd. debit. non fraudarentur obsequiis & animarum curæ in eisdem nullatenus negligerentur sed eorundem congrue supportentur onera debita & consueta proviso etiam

To hold in command.

Proviso.

The Dispensation set forth.

*The King's
Confirmation
of the
Com-
mendam
by Letters
Patents.*

semper quod dict. literæ dispensation. eidem Episcopo Lincoln. elect. non proficerent nisi per literas patentes regiarum majestatum forent confirmat. prout per easdem literas dispensation. plene liquet Et idem Willielmus ulterius dicit quod Dominus Rex & Domina Regina nunc postea scilicet 23 die Decembris Anno Regni sui tertio apud Westm. præd. per literas suas Patentes sub Magno sigillo suo Angliæ sigillat. geren. dat. eisdem die & Anno & in Curia ipsorum Dom. Regis & Dom. Reginae cancellariæ apud Westm. præd. secundum formam statuti debitomodo de recordo irrotulat. præd. literas dispensationis & singula in eis content. juxta præd. actum Parliamenti confirmaver. & pro seipsis hæredibus & successoribus suis ratificaver. approbaver. & confirmaver. ita quod dictus reverendus in Christo pater Thomas Episcopus Lincoln elect. in dictis literis dispensationis nominat. omnibus & singulis in eisdem specificat. uti frui & potiri valeret & posset libere & quiete impune & licite secundum vim formam & effectum earundem absq; impedimento quocunq; eo quod expressa mentio de certitudine præmissorum aut de aliis donis sive concessionibus per præd. Dominum Regem & Dnam. Reginam antetunc fact. in dictis literis patentibus minime fact. existit. aut aliqua

re causa vel materia quacunq; in aliquo non obstan. prout per easdem literas patentes plenius apparet Et idem Willielmus Lancaster ulterius dicit quod prædict. causa pro qua prædict. literæ dispensation. per præd. Archiepiscopum & literæ patentes per prædict. dominos Regem & Reginam nunc sic ut prefertur fact. fuer. non est Contrarium sive repugnans sacrae Scripturae & legibus Dei quodq; hujusmodi literæ dispensationis pro similibus causis ante editionem prædict. actus Parliamenti usitat. & consuet. fuissent haberi per hujusmodi Episcopos subditos dicti Domini nuper Regis Henrici octavi apud prædict. sedem Romanam quodq; postea scilicet 25 die Decembris Anno Dni. 1691. supradict. præd. Thomas Tenison rite & canonice creat. & consecrat. fuit Episcopus Episcopatus Lincoln. prædict. videlicet apud Westm. præd. quodq; prædictus Thomas Episcopus Lincoln prædict. vigore premisorum habuit & in suos proprios usus & utilitates convertit applicavit & disposuit omnes & omnimodos fructus proventus aliaq; proficua præd. vicariæ Ecclesiae parochial. sancti Martini in Campis præd. in Com. Middlesex usq; præd. primum diem mensis Julii tunc prox. a dat. dict. literarum dispensation. præd. videlicet apud parochiam

Collation
of the De-
fendant.

Averment
of Una &
eadem
persona.

am præd. in Com. præd. ad quem quidem diem vicaria illa Ecclesiæ præd. secundum limitationem in prædictis literis dispensationis mentionat. vigore præmissorum vacavit scilicet apud Westm. præd. per quod idem Henricus Episcopus London vicariam illam sic vacantem contulit eidem Guilielmo Lancaster Clerico suo & eum in corporali possessione ejusdem vicariæ poni fecit tempore pacis tempore Domini Regis & Dominae Reginae nunc scilicet apud Westm. præd. idemq; Guilielvicar. vicariæ præd. ex collatione præd. Henrici Episcopi London diu ante impetration. brevis originalis præd. fuit & adhuc existit & hoc idem Willielmus parat. est verificare unde petit judicium si dicti Dominus Rex & Domina Regina actionem suam præd. versus ipsum Guilielmum habere debeant &c. Cum hoc quod præd. Guilielmus verificare vult quod præd. Thomas Tennison in narratione prædicta superius nominat. & præd. Thomas Tennison in literis dispensation. præd. superius nominat. sunt una & eadem persona & non alia neque diversa quodq; vicaria Ecclesiæ Sancti Martini in Campis in brevi & narratione præd. superius nominat. nec non vicaria perpetua Ecclesiæ parochialis Sancti Martini in Campis in literis dispensa-

tionis præd. superius mentionat. sunt una & eadem & non alia neque diversa.

Et præd. Edwardus Ward *Demur-
rer to one
of the
Pleas.* Armiger modo Attorn. dictorum Domini Regis & Dominae Reginae nunc general. qui pro eisdem Domino Rege & Domina Regina sequitur quoad præd. placitum præd. Episcopi London pro dict. Domino Rege & Domina Regina dicit quod dict. Dominus Rex & Domina Regina per aliqua per præd. Henricum Episcopum London superius placitando allegat. ab actione sua præd. inde versus ipsum Episcopum London habend. præcludi non debent quia dicit quod narratio prædict. materiaq; in eadem content. bona & sufficiens in lege existunt ad ipsos Dnum. Regem & Dnam. Reginam ad actionem suam præd. versus præfat. Episcopum London habend. mauntenend. quam quidem narrationem materiamq; in eadem content idem Attorn. general. pro eisdem Domino Rege & Domina Regina parat. est verificare & probare prout Cur. &c. Et quia præd. Episc. London ad narration. illam non respondet nec illam hucusq; aliququaliter deduc. idem Attorn. General. pro eisdem Dom. Rege & Dom. Regina petit judicium versus præd. Episcopum London & breve metropolitano &c. eo quod præd. Episcopus London est

est pars & nominat. in brevi originali ipsorum Regis & Reginae sibi adjudicati, &c.

*Demur-
rer to the
other.*

Et quoad præd. placit præd. Guilielmi Lancaster per ipsum Guilielmum superius in barram placitat. idem Attorn. General. pro eisdem Domino Rege & Domina Regina dicit quod dict. Dominus Rex & Domina Regina per aliqua per præd. Willielmum Lancaster superius placitando allegat. ab actione sua præd. inde versus ipsum Willielmum habend. precludi non debent quia dicit quod placitum illud materiaq; in eodem content. minus sufficien. in lege existunt ad ipsos Dominum Regem & Dominam Reginam ab actione sua prædicta versus præfat. Guilielmum Lancaster habend. præcludend. quodq; ipse pro ipsis Domino Rege & Domina Regina ad placitum illud modo & forma præd. superius placitat. necesse non habet nec per legem terræ teneatur aliquo modo respondere & hoc idem Attorn. General. pro eisdem Domino Rege & Domina Regina parat. est verificare unde pro defectu sufficien. placiri præd. Willielmi Lancaster in hac parte idem Attorn. General. pro eisdem Domino Rege & Domina Regina pet. iudicium versus ipsum Willielmum & breve Metropolitano, &c.

Et præd. Willielmus Lancaster dicit quod placitum præd.

per ipsum Willielmum modo & forma præd. superius placitat. materiaq; in eodem content. bon. & sufficien. in lege existunt. ad ipsos Dominum Regem & Dominam Reginam ab actione sua præd. versus prædictum Willielmum habend. precludend. quod quidem placitum materiaq; in eodem content. ipse idem Willielmus parat. est verificare & probare prout Cur. &c. Et quia præd. Attorn. General. pro eisdem Domino Rege & Domina Regina ad placitum ill. non respondet nec ill. huiusque aqualiter dedit ipse idem Willielmus (ut prius) pet. iudicium & quod prædict. Dominus Rex & Dna. Regina ab actione sua præd. inde versus ipsum Willielmum habend. præcludantur, &c. sed quia Cur. dict. Dom. Regis & Dominae Reginae nunc hic de iudicio suo de & super præmissis reddend. nondum advisatur dies inde dat. est tam præfat. Attorn. General. Dom. Regis & Dominae Reginae qui &c. quam præd. Episcopo London. & præd. Willielmo coram Domino Rege & Domina Regina usq; in crastino Sanctae Trinitatis ubicunq; &c. de iudicio suo de & super præmissis illis inde audiend. eo quod Cur. dict. Dom. Regis & Dominae Reginae nunc hic inde nondum &c. ad quem quidem Crastin. Sanctae Trinitatis coram Dno. Rege

➤ Rege & Domina Regina apud Westm. ven. tam præd. Edwardus Ward Attorn. dict. Dom. Regis & Domina Regina nunc general. qui &c. in propria persona sua quam præd. Henricus Episcop. London & Willielmus Lancaster per Attorn. suum præd. Et sic Continuat. usq; ad Octab. Sancti Hill. ad quasquidem Octab. Sancti Hill. coram Domino Rege & Domina Regina apud Westm. ven. tam præd. Edwardus Ward Attorn. dict. Dom. Regis & Domina Regina nunc general. qui &c. quam præd. Henricus Episcopus London & Willielmus Lancaster per Attorn. suum præd. & super hoc visis & per Cur. dict. Dom. Regis & Domina Regina nunc hic plenius intellectis omnibus & singulis præmissis maturaq; deliberatione superinde habita videtur Cur. Domini Regis & Domina Regina nunc hic quod narratio præd. materiaq; in eadem content. bon. & sufficien. in lege existunt ad ipsos Dom. Regem & Domina Regina ad actionem suam prædictam versus præfat. Henricum Episcopum London habend. manutenend. quodq; prædict. placitum præd. Guilielmi Lancaster superius in

barram placitat. materiaq; in eodem content. minus sufficien. in lege exist. ad ipsos Dominum Regem & Dnam. Regina nam ab actione sua præd. versus præd. Willielmum Lancaster habend. præcludend. prout præd. Edwardus Ward qui &c. superius allegavit——Ideo consideratum est quod iidem Dominus Rex & Dna. Regina nunc recuperent versus præfat. Henricum Episcopum London & Willielmum Lancaster præsentation. suam ad Vicariam præd. & quod habeant breve Johanni Cantuar. Episcopo totius Angliæ Primat. & Metropolitan. Eo quod præd. Hen. Episcopus London est pars & nominatur in breve præd. quod non obstan. reclamatione ipsius Episcopi & præd. Guilielmi Lancast. licet Vicaria præd. eidem Willielmo Lancaster colat. est & ipse in Corporali possessione ejusdem Vicariæ posit. existit. ipsum Willielmum ab eadem Vicaria amoveat & ad Vicariam præd. ad presentation. dict. Dom. Regis & Domina Regina nunc idoneam personam admittat & præd. Henricus Episcop. London & Willielmus Lancaster in misericordia &c.

Attorney

Attorney General *versus* Henry Lord Bishop of London
and Dr. Lancaster, and Dr. Birch.

Dr. Lancaster's Case.
3 Lev. 377,
382.
Case in Parl.
164.
2 Salk. 559.
1 Show. 441.

Quare Impedit for the Vicarage of St. Martin in the Fields, in the County of Middlesex, setting forth, that Humfrey late Bishop of London, was seised of the Advowson thereof in Fee in the Right of his Bishoprick: Which Vicarage being void, he collated Dr. Lamplugh thereunto, who being afterwards made Bishop of Exeter, and the Vicarage being void by his Promotion, King Charles the Second by vertue of his Prerogative, did present Dr. Lloyd thereunto, who was afterwards made Bishop of St Asaph; and the said Vicaridge being again void by his Promotion, the said King thereupon presented Dr. Tennison who was afterwards made Bishop of Lincoln; so that the said Vicarage being now void by his Promotion, it belonged to the King and Queen to present ratione Prærogativæ suæ Regiæ, but were hindered by the Defendants.

The Defendants crabe Oyer of the Writ, which was read in hæc verba, by which it was recited, that the Church was void, & ad nostram spectat donationem, and then they plead in Abatement, and shew this Variance between the Declaration and the Writ, viz. That by the Declaration the King's Title was set forth to present ratione prærogativæ, and by the Writ 'tis pleno jure; so for this Variance they pray that the Writ may be quashed.

To this Plea the Attorney General demurred, and the Defendants joined in Demurrer, and thereupon there was a Respondeas ouster awarded; upon which the Bishop demurred generally to the Declaration, and the Attorney General joined in Demurrer.

25 H. 8. c. 21 Dr. Lancaster pleaded in Bar, and confessed the Seisin of the late Bishop of London, as laid in the Declaration, and all the Presentations and Consecrations, &c. then he pleaded those Clauses in the Statute of H. 8. by which Power is given to the Archbishop of Canterbury to grant Dispensations as the Pope did formerly; that after the said Statute, and before the Writ purchased, the Defendant was consecrated Bishop of London, and that Dr. Tennison was elected Bishop of Lincoln on the 25th Day of December, 1691. but before his Consecration the Archbishop granted a Dispensation to hold the Vicaridge of St. Martin, and the

the Rectory of St James in Commendam with the Bishoprick of Lincoln, until the first of July next after the Date of the said Dispensation, that the King by Letters Patents under the Great Seal did confirm the said Dispensation pursuant to the said Statute of H. 8.

That D^r. Tennison was consecrated Bishop of Lincoln, and held the said Vicaridge and Rectory in Commendam till the said first Day of July, and then the said Church of St. Martin became void by his Promotion, and the Bishop of London presented the Defendant D^r. Lancaster, &c.

D^r. Birch pleaded the same Plea mutatis mutandis as to the Rectory of St. James.

To both which Pleas the Attorney General demurred, and the Defendants joyned in Demurrer.

First, It was said, that there could not be a more material Variance than between this Writ and Declaration; the one was general, and the other special, and founded upon different Rights; and therefore according to all the Authorities in the Books the Writ ought to be abated.

Then the Questions on the Pleadings were;

(1.) Whether the King had a Prerogative to present upon an avoidance by Cession?

(2.) If he hath such Prerogative, then whether this Dispensation in commendam retinere hath not satisfied his Turn?

As to the first Point, the common Usage for above 100 Years supported by solemn Judgments, hath settled that part of the Prerogative, viz. that where an Avoidance happens by Cession, the King may present *ratione prerogativæ sue*; this my Lord Vaughan in arguing D^r. Eade's Case, took for granted.

'Tis true, there may be some old Books which deny this Prerogative, but my Lord Rolle was of Opinion, that the Law is otherwise at this Day, and to prove it, he cited Holland's Case, where the Law was not only taken to be so now, but those old Books were denied to be Law, because the Opinion in that Case was, that the King had such a Prerogative at the Common Law.

But to make this a little more plain, there are two solemn Judgments upon this very Point; the one is reported in Moor, which was thus, viz. The Incumbent of the Vicaridge of Barnham was made Bishop of St. Asaph, and the Queen presented one Randal, who was instituted and inducted; and the Patron brought a Quare Impedit; there was

2 Roll. Abr.
343. pl. 3.
Cro. Eliz.
542.

Moor 399.
Wright's
Calc.

D d

was

was a Plea in Bar, and a Demurrer to that Plea; the Question was, Whether the Queen could present by Virtue of her Prerogative? And upon Perusal of many Precedents and a great Deliberation had, at last Judgment was given for the Queen.

2 Cro. 691.
Woodley's
Case.

About 30 Years afterwards the same Question came to be debated again; it was in a Quare Impedit brought for the Church of Tedlin in Devonshire, the Incumbent being made a Bishop in Ireland, and the like Judgment given as before against the Grantee of the next Avoidance.

Dyer 228. b.

There is a single Opinion of one Judge in the 6th Year of the Queen, that the Crown had not such a Prerogative; but the Opinion of one Man cannot in Reason or Justice be opposed to solemn and deliberate Judgments; besides, 'tis probable that some of the old Books might induce that Judge to be of that Opinion, not because they say the King had no such Prerogative, but because when such Actions were brought to recover Presentations, as in the Reign of Ed. 3. and H. 4. pro hac vice tantum, there is no Mention of this Prerogative, and from thence it might be inferred he had none.

Bro. Abr. tit.
Presentment
al Eglise pl.
61.

But my Lord Brooke in his Abridgment mentions a Presentment to the Church by King Ed. 3. ratione prerogative, which the Bishop of Ely had seen, and it was where the Church was void by Cession, as in this Case.

It must be admitted, that until the Reign of H. 8. the Books are not very clear in this Point, but the Reason is plain, 'tis because before that Time the Avoidance of a Benefice by Promotion could not properly be said to be the Act of the King, but of the Pope.

Dyer 228. b.

2. This Title is not hurt by the Dispensation in Commendam retinere, or by any other Matter appearing upon the Record; for the Dispensation coming after the Election, and before the Consecration, doth suspend and prevent the Avoidance, and by Virtue thereof the Incumbent is still in his Living per vim prioris tituli; and this appears plainly in Sir Henry Sidney's Case reported by my Lord Dyer; for Parkhurst, who was the last Incumbent of the Living, had a Dispensation to hold it for three Years before he was made Bishop of Norwich; afterwards he was made a Bishop and resigned his Living within the three Years: Upon this the Queen presented, supposing she had a Title by Cession; but it was adjudged for the Patron, that the Living was void by Resignation, which proves that the Bishop of Norwich, notwithstanding his Consecration, was still Incumbent of the Living.

And as a farther Evidence of this Matter, if after such Dispensation in Commendam retinere, the Patron should present another to the same Living, the Bishop may have a Title of Spoliation, which will not properly lie but by one Incumbent against another. Vaug. 24.

The King's Confirmation in this Case doth not give any new, or other Right to the Incumbent than what he had before; 'tis only a formal Thing to compleat the Act of the Archbishop, which otherwise would be void.

This is a temporary Provision for the Church, and but a few Days more than a Commenda semestris, which my Lord Hobart tells us, did grow out of a natural Equity, that the Church should not be without a Pastor, during that Time wherein the Patron is allowed by the Law to present, and it being so small a Portion of Time, ought not to be regarded; for *de minimis non curat Lex*.

Econtra. Most of the Prerogatives of the Crown were conferred upon our Kings by the Common Law, such only excepted which are given by particular Acts of Parliament; but neither by the Common or Statute Law hath he any Prerogative to present upon an Avoidance by Cession where the Patronage is in another. And therefore in Woodley's Case it was the Opinion of Justice Hutton, that where the King himself is not Patron of the Living, he shall not present, tho' he makes the Incumbent a Bishop.

As to what hath been cited out of my Lord Brooke's Abridgment, 'tis little to this Purpose, 'tis only what the Bishop of Ely told the Chief Justice; there was no judicial Determination of the Matter; and he begins and ends the Case with a Nota of Admiration, that there should be such a Presentment seen *ratione prerogativæ* in the Reign of Ed. 3. upon an Avoidance by Cession.

'Tis true, Presentments have been made to several Churches by former Kings, where the Incumbents have been made Bishops, not by Virtue of any Prerogative, but because the Person promoted was Patron of the Church, and his Temporalties were then in the King's Hands upon his Promotion; so is the 41 Ed. 3. 5. b. And this was my Lord Coke's Opinion, viz. where the King had seized the Temporalties of the Bishop of Exeter for a Contempt, and then made the Archdeacon of Cornwall a Bishop, the King presented to the Archdeaconry, because the Temporalties of the Bishop, who was Patron thereof, were then in the King's Hands. 4 Inst. 356.

The Year-Book 11 H. 4. fol. 37, 38. is much against this Prerogative, and 'tis the most antient Case of a Commendam that is reported in our Books; it was a Quare Impedit brought by the King for a Prebend of Salisbury against Robert Halommer Bishop of that See, and against Henry Chiche-ly Bishop of St David: The Declaration was, that R. Medford late Bishop of Sarum, had collated the said Henry Chiche-ly to the aforesaid Prebend, who died; and that the Bishop of London was translated to Sarum, and from thence to Bath and Wells, by Reason whereof the Temporalities of the Bishoprick of Sarum came into the King's Hands; that Chiche-ly was made Bishop of St. David, so that the said Prebend became void by his Promotion, and that it belonged to the King to present, who was hindered, &c.

The Bishop of Sarum pleaded that he was Patron of the said Prebend in Right of his Bishoprick, and traversed the Avoidance when the Temporalities of his Predecessor were in the King's Hands, and the Incumbent pleaded, that he was presented by the Bishop of Sarum, and traversed the Avoidance, ut supra; but the Court being of Opinion, that he being made a Bishop, ought to shew some Title to this Prebend; he then pleaded, that before he was consecrated Bishop of St. David, he had a Grant from the Pope to retain his former Benefices, &c.

'Tis true, no Judgment was given upon this Pleading, but the Reason was, because Norton the King's Serjeant did relinquish the King's Title as set forth in this Count, and declared de novo upon the Statute of Provisors, that the Pope had usurped an Authority to dispense against the Law, &c. which shews, that if the Prebend was vacant (notwithstanding such Dispensation) when the Temporalities were in the King's Hands, then he might present; but if it became void after they were granted to the succeeding Bishop, then he could not present, so that 'tis plain the King's Counsel did then think he had no such Prerogative, and that he had either a Right or none to present in that Case as the Temporalities happened either to be or not to be in his Hands.

Bro. Abr. tit.
Presentment
al Eglise
pl. 14.

My Lord Brooke in abridging the aforesaid Case agrees, that when an Incumbent is made a Bishop, his former Benefices are void, but doubts whether the King or Patron shall present; and therefore he added a Quare to the Usage, because it seemed unreasonable to him that the King should present upon any Promotion of the Incumbent, where the Right of a Patronage is in another.

This

This was a Prerogative not thought on when St. Germaine Dr. & Stud. wrote; for he tells us, that when any Benefice is void by Cession, the six Months to prevent a Lapse, shall be accounted from such Cession; which shews that it was his Opinion that the Patron, and not the King, had the Right of Presentation, because if it belonged to the King, there could be no Lapse. ^{116.}

The Judgment of the Court in Sir Henry Sidney's Case was against this Prerogative, and all the Precedents before the Reign of H. 8. which mention it, are nothing to the purpose, because they were between spiritual Persons, who in those Days were wholly subservient to the Pope; and 'tis a weak Argument to alledge, that because the Pope presented at that Time, therefore the King shall now; for what the Pope did was by an absolute Usurpation; he had then such an Authority in this Nation, that Judge Hankford affirmed in the Argument of that Case between the King and the Bishop of Salisbury, quod Papa potest omnia; and *My* Lord Hobart calls him *Dæmon meridianus*. Hob. 146.

There was never any Exercise of this Prerogative in the Reigns of those Kings who withstood the Usurpations of the Pope; sometimes it hath been claimed, but still adjudged for the Patron; so is 5 E. 2. where this Prerogative is not so much as mentioned, neither doth Staundford take any notice of it; and certainly if the King had had such a Prerogative, it would not have escaped his Observation under the Title of his 8th Chapter de Ecclesiis vacantibus, quarum advocaciones spectant ad Regem, & alii presentaverunt ad eandem.

In Wright's Case, Williams, who then argued for this Prerogative, gave this Reason why the King should present upon an Avoidance by Cession (*viz.*) because the Pope did so formerly before his Power was abrogated by the Statutes of H. 8. and therefore the King might do it, since that the Bishop had his Presentment gratis both from the Pope then, and from the King now, and the Patron had no Power after a Presentment made, till the Death or Resignation of his Clerk. The Court not being satisfied with this Reason, asked him if he could shew any Precedents to maintain his Argument, but he could produce only a few between spiritual Persons, and therefore the Precedents were not regarded, because the Persons whom they concerned, were in absolute Subjection to the Pope: And true it is, as Justice Walmsly there observed, that this Custom began by the Usurpation of the Pope; and he mentions the Year Book of Ed. 2. where upon solemn Debate this Point was adjudged for the Patron.

Owen 144.
Moor. 399.
Cro. Eliz.
526.

(2. Point)

(2. Point) But admitting the King hath such a Prerogative, then his Dispensation in Commendam retinere hath satisfied his Turn, especially since it hath exceeded the Canon, for this was more than semestris Commenda.

Hob. 144.

These Commendams were never of any Reputation either in the Common or Canon Law, 'tis quasi comedendum; and in this Case 'tis neither semestris, for it was for six Months and nine Days; neither is it perpetua but temporanea: Now if this shall not be counted an Exercise of the Prerogative, and the Turn to present thereby satisfied, then the King may dispense for 20 Years, and afterwards present for Life.

There are Variety of Opinions how this Commenda limitata shall be taken; some have held, that tho it is limited for a certain Time, yet the Commendator may retain the Living during his Life; others, that he shall have it only for the Time limited; and so long he must have it, for otherwise the Church would be void during that Time; but all agree that a Grant in Commendam retinere is quasi a Presentation, and the Church is thereby full of an Incumbent. 'Tis true, my Lord Vaughan was of another Opinion in his Argument in Dr. Eade's Case, that by Virtue of such a Dispensation before the Parson is consecrated Bishop, he remains Parson of the same Benefice still, and hath the same Estate he had therein as well after as before his Consecration, and that Dispensation gave him no new Right, but only a Power to hold that which he had before; and by Consequence there was nothing upon which the Prerogative could work so as to satisfy the King's Turn to the Presentation; but he was of Opinion likewise that such Dispensation prevented an Avoidance, and if so, that will defeat the Grantee of the next Avoidance to present; for he is to have the next Presentation only, and that he cannot have where a Dispensation interposeth; so that it seems such a Dispensation shall amount to a Presentation upon the next Avoidance (be it by Cession or otherwise) so as to be good against such Grantee, and to make his Grant void; and what Reason can be given why it shall not likewise be a Presentation by the King upon an Avoidance by Promotion; and if so, then his Turn must be satisfied.

2 Salk. 540.

Dr. Birch's
Case.

3 Lev. 382.
Cases in
Parl. 164.

In Hillary Term afterwards Judgment was given for the King, and upon the same Reasons Judgment was also given in Dr. Birch's Case, which is as followeth, viz.

The Parish of St. James was newly constituted by Act of Parliament out of the Parish of St Martin, the Substance of which Act was, viz.

I

That

That a certain Precinct of Ground therein mentioned shall be the Parish of St. James, &c. That there shall be a Rector thereof, &c. That Dr. Tennison shall be the first Incumbent, that he and his Successors, Rectors thereof, shall be a Corporation, &c. That the Patronage thereof, after his Decease or Avoidance, shall be in the Bishop of London and his Successors, and in my Lord Jermyn and his Heirs by Turns.

That after the Decease or Avoidance of Dr. Tennison the Bishop shall present, then my Lord, and afterwards the Bishop, &c. shall have two Turns, and my Lord and his Heirs one Turn.

This Act was set forth in the Declaration, and that Dr. Tennison was made Bishop of Lincoln, that the said Church of St. James became void upon his Promotion, and thereupon it belonged to the King and Queen by Virtue of their Prerogative to present, &c.

Dr. Birch pleaded the same Plea as Dr. Lancaster did in the Case before-mentioned.

The Debate now was, that admitting the King had a Prerogative to present by Cession, yet such a Prerogative could not be exercised in this Case, because it would be expressly against such an Act of Parliament, for this was a Parish newly created, the Church was never yet presentative, and being now void by Cession, the Presentation must be in the Bishop; for by the Words of the Act 'tis expressly given to him after the Decease or Avoidance of Dr. Tennison.

The King is entitled to several Prerogatives by the Common Law as a Subject is to a Prescription or Custom, but both Prerogatives, Prescriptions and Customs may be bound by Acts of Parliament. 11 Rep. 59. a.

Concerning the first of which there are these and many more Instances, viz. By the Statute of Marlbridge cap. 22. 'tis enacted, That none may distrain his Freeholders to answer for their Freehold, without the King's Writ. This is a general Law, and tho' the King is not named by way of Restraint, yet it has been construed to bind him in point of Law; for there is a Writ in the Register directed to the King's Bailiffs of his Manor of, &c. commanding them not to distrain. 2 Inst. 141.
Reg. 171.

By the Statute of W. 1. cap. 5. the King commanded upon great Forfeitures that none should disturb Elections; he is bound by this Law. 2 Inst. 169.

So where any Statute is made to prevent or suppress any Wrong, the King tho' not named is bound by it, because

Hob. 298.

cause he can do no Wrong, and where ever affirmative Statutes introduce a new Law (as here) such Statutes do necessarily imply a Negative of all which is not contained in their Purview.

So that admitting this Prerogative to present upon the Promotion of the Patron's Presentee, as in *D^r. Lancaster's Case*, yet 'tis not to be exercised here, because *D^r. Tennison* was never presented to this Church; he first came in by the Donation of the Parish, and afterwards it became an Incumbency by the Gift of the King, Lords and Commons, so that this Prerogative fails because the Living is a Donative by Parliament, and not by the Presentation of the Patron; and likewise because the King cannot present where the Patron could not; and here never yet was any Patron: His Prerogative is to present upon Promotion of the Patron's Presentee; and the Reason given is, because this is so far from being an Injury, that 'tis a Kindness to the Patron that the King should take so much notice of his Clerk, as to dignify him in the Church by making him a Bishop.

But here was no Promotion of the Patron's Presentee, for *D^r. Tennison* was never presented by any particular Person: Nay this Church was never presentative till now, for it was but newly made a Church or Parish, so that the Reason of this Prerogative failing in this Case, that too must likewise fail.

Here is a particular Presentation given to the Bishop by an Act of Parliament; 'tis not yet a Patronage, because there never yet was any Presentation to the Church, there was never any Avoidance since its Creation; 'tis true, 'tis now void by Promotion, but 'tis not such a common or ordinary Avoidance, upon which this Prerogative can operate, because by the Act a new Right is introduced, and expressly given to the Bishop for the next Presentation.

The King cannot demand first-fruits and Tenths out of this Parish, yet such are incident to his Prerogative; but not being sated to him in the Act, that shall never operate here to give him any Title to them.

This Case therefore doth not fall under any of the Reasons or Resolutions which have been given to maintain the Prerogative to present to a Living void by Cession, because (as it hath been said) 'tis not in the Nature of an Advowson, but a Donative; and this is proved by the Act it self, for there is a Clause to subject it to the Jurisdiction of the Bishop, which had been in vain if he had any Authority without it.

For the Bishop of London is not Patron of this Parish Church, because he was so of St Martin's, out of which 'tis derived; the Patronage is given to him after the next Avoidance, and there is a particular Clause in the Act, that all succeeding Rectors thereof shall be presented, instituted and inducted as other Rectors are, which proves that the first Rector was not so presented.

So that by what has been said it may appear that this was not a Presentation, but a Donative to Dr. Tennison; and till a Presentation once had there is no Subject-matter for the Prerogative to work on.

Econtra. There is no Reason in Law which makes any Difference in the King's Prerogative to present upon Cession to a new or old Living: For in both Cases the Title of the King is by the Promotion of the Incumbent, who had the Care of both Parishes here, and the new one being created out of the old Parish, participates of the same Nature with it, and must be subject to the same Rules of Law, unless some special Provision is made in the Act to exempt it.

Thus it was when upon the Dissolution of Abbies after the Statute of 31 H. 8. and new Bishopricks were created, those did participate with the same Nature of the most Antient, and all Incidents belonging to the old Bishopricks did follow those which were newly created by that King.

Now this Act hath made no Difference between the new Rectory and the old Uxbridge, it makes it presentative in its Nature, and limits the Right of Presentation to my Ld. Bishop and Ld. Jermyn, not by Way of vesting any Right in either, so as to give away that Prerogative the King had at the Common Law; for their Title comes under the Word videlicet; so that the Act must be understood in the Nature of a Partition between them, and the rather because 'tis an affirmative Act which will not take away any antecedent Right, and 'tis generally known that the Prerogative is not bound, if not mentioned.

'Tis no Objection to say, that the Bishop shall lose his Turn by this means, because 'tis no more than what is allowed by Law in Cases of the like Nature, as it was in Woodley's Case, where the Grantee of the next Avoidance lost his Presentation, because upon the Promotion of the Incumbent the King had a Title by his Prerogative to present.

Acts of Parliament are to be construed in favour of the King's Prerogative, and therefore this shall be construed to make an Abolition presently vested in Point of Interest,

for which the Prerogative shall not stay till (as it hath been objected) 'tis executed once in Presentation.

32 H. 8.
34 H. 8.

As to the Objection, that this is an affirmative Act, and so implies a Negative which excludes the King's Interest, the Law is otherwise; for Affirmative Acts do not exclude his Right, the Statutes of Wills are both in the Affirmative, and yet they do not take away a Custom of devising Land.

'Tis absurd to imagine that general Words in an Act of Parliament shall bind a Right which the Makers of the Law never intended to meddle withall; for their Intent here appears plainly to be only to create a Parish, to settle a Rectory, and to order the Right of Presentation: There are no Words throughout the whole Act, from which it can be inferred, that the Prerogative was intended to be bound so as it might not operate upon the Avoidance of this Rectory by Cession, as well as upon the like Avoidance of any other presentative Living whatsoever.

Judicium. Afterwards in Michaelmas Term 6 Willi', &c. the Judgment was,

- (1.) That the King hath a Prerogative to present by Cession.
- (2.) That this Dispensation in Commendam retinere had not satisfied the next Turn, and so not barred the King of the Prerogative, &c.

First, The King hath a Prerogative to present upon the Promotion of an Incumbent, and this is no Innovation; for there being no judicial Opinion to the Contrary is a sufficient Evidence to prove this Right; and tho' a natural Reason cannot be given to support it, yet it seems very just, that when the King by the Exercise of his Prerogative hath made a Church void, that he should have a Right to fill the Vacancy; for 'tis but the Exchanging of a Life, and 'tis probable the Patron may (notwithstanding the Change) be as near to his Presentation as before the Avoidance by Cession.

There are but few Authorities in the Books to direct ones Judgment before the Reign of Queen Elizabeth, because the Pope then claimed such Presentations as belonging to his Ecclesiastical Jurisdiction, and the Kings of England did very seldom dispute his Claim, but it doth not follow that they had no such Prerogative, because not claimed in many Years; and tho' a perfect Reason cannot be given why such a Prerogative should be allowed by the

the Common Law; yet the King shall not be barred of his Right; for no Reason can be given for a collateral Warranty, and yet that is Law at this Day.

The Bishopricks of England were at first Donative; but from the 17th of King John to the 25th of H. 8. the Bishops were to be chosen by the Dean and Chapter, but then such Election must have the King's Confirmation, and even the Statute of H. 8. which expresseth the Manner of making Bishops, doth in some Measure restore the Crown to its ancient Prerogative; for tho' by Licence under the Great Seal the Prior and Convent then, and the Dean and Chapter now, have Leabe to elect, yet there must be a Letter mis-^{25 H. 8. ca.} sive containing the Conge d'eslire, and the Name of the Per-^{26.} son whom they shall chuse.

The Authorities which have been cited to maintain his Prerogative, were Wright's Case, where the Question was fully stated and adjudged, and afterwards was admitted to be Law in Sir Robert Bassett's Case.

My Lord Dyer in Hillary Term, Anno 6 Eliz. put the Case of Sir Henry Sidney upon a Quare Impedit against the Bishop of Gloucester and one Reve, who was one of the Queen's Chaplains, and whom he presented to a Church, having made Parkhurst the former Incumbent Bishop of Norwich, supposing he had a Prerogative to present upon an Avoidance by Cession, which he did not take to be Law, and then said, quod alii Socii mei non sentiebant; but the Case was not adjudged upon that Reason, it seems only to be a Parenthesis, and a sudden Opinion of the Judge.

Many Cases may be cited where the Temporalities of Bishops have been seized by the King, and then he hath presented to the Church upon the Promotion of the Incumbent; from whence 'tis inferred, that such Presentations were not by Virtue of any Prerogative, but because the Temporalities were in the King's Hands; this certainly must be a very weak Inference; for to what Purpose should the King make Use of his Prerogative when he had an Interest in the Advowson it self, of which the Bishop was Patron, &c. in respect his Temporalities were then in the King's Hands? So that the Force of this Argument must be (viz.) because the King made Use of his Interest, therefore he had no Prerogative, which is very absurd and inconsequential.

The Reason why all the Books are silent in this Matter, is, because before the Statute of Provisors the King^{25 Ed. 3.} was defeated of this Prerogative by the Usurpation of the

Pope: And this is not only an Answer to what was done before the Making of that Statute, but since also; for notwithstanding that Law, the Clergy were so closely united in Interest, that they did still usurp upon the Rights of the succeeding Kings; for the Pope did still make Bishops in England, and sixteen Years after that Statute this Case did happen, viz.

41 Ed. 3. 5.

John Bishop of Salisbury being Patron in Right of his Bishoprick, presented W. and died, so that his Temporalities came to the King. W. who was the Presenter of the Bishop, was afterwards made Bishop of Salisbury; and because he could not be both Patron and Incumbent of the Living, the King brought a Quare Impedit. The Defendant pleaded, that after the Death of John Bishop of Salisbury his immediate Predecessor, and before his Consecration, and likewise before the Living was void, the King by Letters Patents (reciting his being made a Bishop by the Pope) had granted to him the Temporalities, so that he ought not to present; and this was held a good Plea at that Time, which shews that the Pope did usurp upon this Prerogative.

'Tis true, this Prerogative to present by Cession, is not mentioned in the Statute de Prerogativa Regis, no more is the Prerogative to present by Lapse, and yet this was never denied the King, tho' nothing was said of it likewise in any of the old Books; 'tis mentioned in Cawdry's Case, that the Law was thus in the Reign of Ed. 3. viz. if the Metropolitan did not present within six Months, the King and not the Pope, should provide a Pastor; and yet no such Authority can be found in that King's Time.

Presentment
al Eglise.
61.

But ever since that Case was abridged by Brooke, this Prerogative hath been enjoyed by the Kings of England, and there are no Precedents that the Patron hath presented upon the Promotion of his Incumbent.

Vaugh. 18.
Winch. 91.
Jones 161.
Hob. 143.
2 Roll. Abr.
344.

(2 Point) This Commendam retinere is not a serving the King's Turn; for 'tis not putting a Man into Possession of a new Living without Institution or Induction, 'tis only a Continuation of the old Benefice in the same Person where it was; for that which he had before, cannot be properly said to be commended to him, there is no new Right transferred; 'tis true, if the Incumbent had died during the Continuance of such Dispensation, the King might have lost his Title to present.

And lastly as this Case stands upon the Act of Parliament, the King's Prerogative is let in by making of the Church of St. James a Rectory, and by settling the Patronage;

nage; and 'tis no Objection to say, that the Prerogative shall not work, it being newly created and made a Parish: For when once 'tis established, 'tis subject to all the Ecclesiastical Laws, as Non-residency, Deprivation, &c.

'Tis to be hold by the same Methods which make other Rectories so, viz. if the Patron doth not present within six Months after the Death of the Incumbent, it shall lapse to the Ordinary; so that the Patron is bound by the same Laws in this Case, as in all other Cases of ancient Rectories, and the next Avoidance it self may be granted over by the Act of the Party.

As to the Objection, That the present Rector doth not come in by Presentation, Institution, or Induction, but that 'tis a Donative by the Parliament at least during his Time; and then it was affirmed, That if the Incumbent of a Donative is made a Bishop, the King shall not present, because such a Promotion doth not make an Avoidance by Cession; for the Incumbent is the Creature of the founder, and is not subject to Ordinary and Episcopal Institution.

This must be admitted to be Law, but yet if an Incumbent of a Donative is made Rector by Act of Parliament, as Dr. Tennison was in this Case, then the King hath a Prerogative to present upon the Promotion of such Rector.

The Prince's Case in the 8th Rep. comes near this at the Bar, for in 11 Ed. 3. the Prince was created Duke of Cornwall, Habendum & tenendum eidem Duci & filiis primogenitis ipsius & heredum suorum Regum Angliæ, &c. By these Words the Prince had an Estate in fee-simple in the said Dukedom newly created by Act of Parliament, the Consequence of which was, That the Prince should be endowed thereof: So here, tho' this is a new Rectory created by the like Authority, viz. by Act of Parliament, yet 'tis subject to the same Laws and Rules with other Rectories more antient in Time.

Then as to the Objection that 'tis not an Advowson presentative during the Life of Dr. Tennison; for by the express Words of the Act, the Presentation doth not best in the Patrons till after the Death or Avoidance of the present Incumbent; and if so, the King's Prerogative cannot operate here, because he is intitled to present when the Presentee of the Patron is advanced to a greater Dignity in the Church, and here is no Patron yet; now admitting it to be so, this will not prejudice the King's Title, because 'tis the Promotion of the Incumbent that entitles the King, let the Advowson or Patronage be where it will.

But

3 Cro. 323.
1 Saund 147.

But notwithstanding this Objection, the Right of Patronage even in this Case is vested immediately; 'tis like a Reversion for Life granted cum acciderit post mortem of the Tenant for Life, which vests an Interest immediately, tho' to commence in Possession in futuro.

Lastly, It was never intended by the Parliament to deprive the King of this Privilege, and therefore this Act must be construed (as the Rule is in Sir Francis Barrington's Case) according to the Subject-matter; for which Reasons Judgment was given for the Plaintiff, absente Justice Gregory; which Judgment was afterwards affirmed in Parliament.

Gwynn versus Pie.

Ejectment for two Messuages, two Gardens, and 70 Acres of Land, 15 Acres of Meadow, and 30 Acres of Pasture in Much-Dew-Church, &c. The Plaintiff delivered Declarations to two Tenants only, and as to the Lands in their Possession the Defendant entered into the Common Rule; but because he had made several small Purchases in that Parish, and the Plaintiff claimed only 20 Acres lately granted to him by Lease from the Bishop of Gloucester; therefore he moved by his Counsel, That the Plaintiff might give a Note in writing, before the first Day of the next Term what Lands in particular he claimed, and where such Lands did lie, and in whose Possession, &c. or otherwise that he might not proceed to a Trial at the next Assizes; for the Defendant not knowing what Lands the Plaintiff would claim, could not tell what Purchase-Deeds to produce at the Trial; sed non allocatur.

D E

Term. Sanct. Mich.

Anno 5 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1693.

Blankard *versus* Galdy.

Pasch. 3 Will. &c. Rot. 35.

Memorandum.

Memorandum quod alias scilicet Termino Sancti Mich. ultimo præterit. coram Domino Rege & Domina Regina apud Westm. venit Johannes Blancard Ar. per Jacobum Cunningham Attorn. suum & protulit hic in Curia dicti Domini Regis & Domina Reginae tunc ibidem quandam billam suam versus Laurentium Galdy alias dict. Laurens Galdy Mar. demurent a Londres en la parosse de St. Pierre le penure in Custod. Mar. &c. de plito debi. & sunt pleg. de prof. scilt. Johannes Doe & Richardus Roe que quidem billa sequitur in hæc verba, ff. London ff. Johannes Blancard Ar. que-

ritur de Laurentio Galdy alias dict. Laurens Galdi Mar. ^{2 Salk. 411.} demurent a Londres en la parosse de St. Pierre le penure in Custodia Mar. Marefc. Domini Regis & Domina Reginae coram ipso Rege & Regina existen. de plito. quod reddat ei mille libras sterling legalis monetae Angliæ quas ei debet & injuste detinet pro eo videlt. quod cum præd. Laurentius quinto die Januarii Anno Regni Domini Willi. & Domina Mariæ nunc Regis & Reginae Angliæ, &c. tertio apud London præd. videlt. in parochia beatae Mariæ de arcubus in warda de Cheap per quoddam scriptum suum obligatorium sigillo ipsius Laurentii sigillat. Curiaq; dicti

Debt upon a Bond.

dicti Domini Regis & Dominae Reginae nunc hic osten. cujus dat. est eisdem die & anno cogn. se teneri & firmiter obligari praefat. Johanni Blancard in praed. mille libris solvend. eidem Johanni cum inde requisit. esset praed. tamen Laurentius licet sepius requisit. &c. praed. mille libras praefat. Johanni nondum solvit sed ill. ei hucusque solvere omnino contradixit & adhuc contradicit ad dampnum ipsius Johannis viginti librarum & inde producit sectam, &c.

Imparlance.

Et modo ad hunc diem scilicet diem Mercurii prox. post quinden. Paschae isto eodem termino usque quem diem praefat. Laurentius Galdy habuit licentiam ad billam praedict. intelloquend. & tunc ad respondend. &c. coram Domino Rege & Domina Regina apud Westm. venit tam praedict. John. Blancard per Attorn. suum praedict. quam praedict. Laurentius Galdy per Ricum. Thompson Attorn. suum & idem Laurentius defend. vim & injuriam quando &c. & petit auditum scripti obligatorii praedict. & ei legitur in hac verba, scilicet. **Scachent tous par ces presentes que nous Laurens Galdy Marchant demeurant a Londres en la Paroisse de St. Pierre le paubze & Jaques Gowlales aussi Marchant du dit Londres demeurant en la Paroisse de St Pierre Cornhil sommes te-**

Oyer of the Bond which is in French.

nus & fermement obliges solidaiement, viz. seul pour le tout a Jean Blanchard Jobost Mareschal del Isle de la Jamaica demurant en paroisse de St. Jaques Westm. en Comte de Middlesex en le somme de mille Libres Sterlings monnoie d'Anglie pour estre payes au dit Jean Blanchard ses Exceuteurs Administrateurs ou ayant cause pour faire lequel payment bien & veritablement nous obligions & chachun de nous solidairment seul & pur le tout nos Heretiers Exceuteurs ou Administrateurs ou ayant cause ou les Heretiers Exceuteurs & Administrateurs de chachun de nous fermement per ces presentes seale de nos seaur dat le cinquiesme jour de Janvier dans le troisieme An du reign de nos Souverens Signieur & Dame Guillam & Marie Roy & Royne d'Angleterre d'Ecosse France & Ireland Defenseurs de la Roy. &c. Annoq. Dom. 1662. Petit etiam auditum conditionis scripti obligatorii praed. & ei legitur in hac verba, scilicet. **La Condition de cette Obligation est que si Laurens Galdy demeurant a Londres dessus oblige & Louis Galdy son frere habitant del Isle de Jamaica in Amerique ou tous deux ou les Heretiers Exceuteurs ou Administrateurs deux ou de le une tiennent exercitant**

Oyer of the Condition.

exercitant accomplissent & fount bien & veritablement tous & chacuns les clauses Promises Conditions & Plaintes que de la parte de dit Laurens Galdy & Louis Galdy ou de l'une deux ou de leurs Heretiers Executeurs & Administrateurs se tener executer accomplir & payer compz & specifie dans certaine accord & traite dats de jour de la date des fait autres sus nomme Jean Blancard dune part & de le dit Laurens Galdy tant pur luy que pur le dit Louis Galdy dautre parte selon veritable Sens & Intention dun accord & traite alors la present Obligation serra nulle & de nul effect autrement serra & demoura en la plene force & vertue. Quibus lectis & auditis idem Laurentius dicit quod præd. Johannes actionem suam præd. inde versus ipsum Laurentium habere seu manutenere non debet quia dicit quod articul. & agreement. in Conditione præd. scripti obligatorii mentionat. fact. fuer apud London præd. in paroch. & warda præd. quinto die Januarii Anno Regni Domini Wilhelmi & Dnz. Mariæ nunc Regis & Regina Angliæ &c. tertio supradicto inter præd. Johan. Blancard per nomen Johannis Blancard præpositi Mareschal General Anglice Provost Marshal General de insula de Jamaica

residen. in Parochia sancti Jacobi Westm. in Corn. Middlesex ex una parte & præd. Laurentium Galdy per nomen Laurentii Galdy mercatoris residen. in London in parochia sancti Petri pauperis agens tam in nomine suo quam pro fratre suo Ludovico Galdy habitator. præd. insulæ de Jamaica ex altera parte quorum quidem articulorum alteram partem sigillo ipsius Johannis Blancard sigillat. idem Laurentius hic in Curia profert (geren. dat. eisdem die & anno supradictis) recitan. modo sequen. videlt. in consideratione quod Laurentius Galdy in nomine Laurentii Galdy prædict. fecisset contract. articuli & agreement. cum præd. Johan. Blancard pro exercitio prædict. oneris vel officii præpositi Mareschal de Jamaica duran. termino septem annorum & dimidii unius anni incipend. a sexto die Julii tunc proximo anno Domini 1692. sub clausula & conditione postea menconat. & quod Johannes Blancard misisset novam Commissionem procuracon. vel deputacon. isto die dat. cujus deliberasset quatuor Copias Anglice Dispatches per ipsum signat. & sigillat. in manus prædict. Laurentii Galdy præfat. Ludovico Galdy direct. cum spatio Anglice & Blank ad inserend. Anglice to fill up & ponend. nomen talis aliæ personæ habitatoria præd.

F f

The Defendant pleads That the Bond was made in London, for the Exercise of an Office in Jamaica.

præd. insulæ qualis præd. Ludovicus Galdy apt. estimaret ad dictum Officium exercend. partes præd. agreassent de articulis sequen. Et imprimis quod deputatio supramencionat. (isto die dat.) non fact. fuit sed pro exercitio dict. officii idem ad incipiend. a præd. sexto die Julii tunc prox. sequen. usq; ad tempus in quo præd. Laurentius Galdy notum faceret præd. Johanni Blancard nomina personarum quas præd. Ludovicus Galdy convenien. estimaret nominare pro deputat. suis durante tempore quod inexpirat. remaneret de præd. septem annis & dimid. unius anni & quod tam cito quam præd. nominatio & declaratio nominum deputat. præd. fact. foret præd. Johannes Blancard obligat. foret facere & mittere Anglice to pass eis novam deputation. pro resid. dicti termini septem annorum & dimid. unius anni & quod ista deputatio (eodem die dat.) vacua & nullius effectus remaneret Et ulterius dic. qd. præd. Laurentius Galdy tam pro seipso quam pro præd. Ludovico Galdy parte sua firmiter alteruteri & pro toto conveniunt agreaverunt & obligaverunt seipsos Executores & Administratores suos (causam habentes) prædicto Johanni Blancard Executoribus & Administratoribus suis & causam haben. solvere vel

solvi causare bene & fideliter vere & de facto præd. Johanni Blancard Executoribus Administratoribus sive Attorn. suis (cum causam haberent) summam quadringent. librarum sterling pro quolibet Anno bonæ & legalis monetæ Angliæ duran. præd. termino septem annorum & dimid. unius anni in eadem Civitate London. in domo ubi præd. Johannes Blancard habitavit vel habitaret ad finem terminorum solution. postea mentionat. in quatuor equal. solution. videlt. super sextum diem Octobris super sextum diem Januarii super sextum diem Aprilis & super sextum diem Julii cujuscumque præd. annorum de quibus prima solutio facta foret super sextum diem Octobris tunc prox. ac etiam qd. Laurentius Galdy in nomine præd. firmiter obligavit seipsum ut præfertur defendere Anglice to save harmless & indempnem præstare prædict. Johannem Blancard ab omnibus periculis prædict. officii duran. præd. termino septem annorum & dimid. unius anni & a dampnis detrimentis & confiscationibus quæ accrescerent ab onere prædict. pro negligentia default. defect. mala gestura vel malo administratione tam prædict. Ludovici Galdi quam deputatorum suorum vel personarum cum quarum nominibus specificat. in prædict. deputa-

putatione insert. foret vel quas postea appunctuaret pro deputat. suis Et quod prædict. Ludovicus Galdy vel illi quor' nomina &c. bonam & sufficien. securitatem darent gubernatori præd. insulæ pro exercitio præd. officii in modo sicut consuet. est & in casu placeret dictis Dom. Regi & Dnæ. Regina revocare literas patentes quas concesserunt de dicto officio præfat. Johanni Blancard quinto die Novembris Anno Dom. 1690. secundum potestatem quam reservaverunt sibiipsis per præd. literas vel si præd. Dominus Rex & Dna. Regina Offic' cessare causarent ante expirationem præd. septem annorum & dimid. unius anni conclusum & agreeatum fuit inter partes prædict. quod tunc istud agreementum una cum prædict. deputatione fact. prædict. Ludovico Galdy vel ejus Deputat. & quæ postea per prædict. Johannem Blancard fact. foret null. & nullius effectus remaneret quasi eadem nunquam fact. fuisset in quo casu præd. Laurentius & Ludovicus Galdy non solverent præd. Johanni Blancard Executoribus vel Administratoribus suis (& causam haben.) pro aliquo longiore tempore quam quo gauderent & exercerent dictum officium per ipsos vel eorum deputat. & solummodo usq; ad diem in quo actualiter amoti forent ab exercitio præd.

officii secundum ratam quadrigent. librarum sterlingorum per annum &c. prout per articulos præd. plenius liquet & apparet Et idem Laurentius ulterius dicit quod per quendam Actum in Parlamento Domini Edwardi sexti nuper Regis Angliæ &c. tent. apud Westm. in Com Middlesex per prorogationem vicesimo tertio die Januarii Anno Regni dicti Domini nuper Regis Edwardi sexti quinto & ibidem continuat. usq; decimum quintum diem Aprilis Anno Regni dicti nuper Regis Edwardi sexti sexto inter alia inactitat. fuit autoritate ejusdem Parliamenti qd. si aliqua persona vel personæ ad aliqd. tempus (and so recite the Act usq; ad the first Proviso) prout per eundem Actum inter alia plenius liquet & apparet Et idem Laurentius ulterius dicit qd. post præd. Actum Parliamenti scilt. præd. quinto die Januarii Anno Regni Domini Regis & Domine Reginae tertio supradicto apud London prædict. in parochia & warda prædict. agreeat. fuit inter prædict. Johannem Blancard & prædict. Laurentium & Ludovicum quod prædict. Johannes faceret prefato Ludovico deputation. officii prædict. præpositi Mar. Anglice of Provoost Marshal in articulis prædict. mentionat. pro prædict. termino septem annorum & dimid. u-

The Act of Ed. VI. against selling of Offices, pleaded.

nius anni & sub conditione & agreement. præd. in prædictis articulis mentionat. & quod præd. Ludovicus & Laurentius pro deputation. officii præd. sic faciend. solverent præfat. Johanni annual. summam quadringent librarum sterlingorum sub modo & agreement. in articulis præd. mentionat. quodq; adtunc & ibidem in prosecution agreement. præd. & pro securitat. solutionis dict. annualis summæ quadringent. librarum articuli præd. & scriptum obligatorium præd. hic in Cur. prolat. fact. fuer. & idem Laurentius ulterius dicit quod præd. officium Præpositi Mar. Anglice of ~~Præposit~~ ~~Marthal~~ in articulis præd. menconat. tangit & concernit & præd. tempore confectio articulorum agreement. & scripti obligatorii præd. tangebatur & concernebat administration. & execution. Justitiæ infra prædict. insulam de Jamaica existen. parcel. possessionum & reventionum dictorum Dom. Regis & Dnæ. Reginae Coronæ suæ Angliæ & sub eorum regimine quodque annual. reddit. vel summa quadringent. librarum per annum per prædict. articulos agreeat. solvend. per prædict. Laurent. & Ludovicum Galdy eidem Johan' solut' fuit pro exercitio & deputatione officii præd' contra formam Statuti præd' videlt' apud London præd' in paroch' & warda præd' & sic idem Laurentius dicit qd' scriptum obligatorium

*The Office
concern-
ing the
Execution
of Justice.*

præd' necnon articul' præd' hic in Cur' prolat' vigore Statuti præd' penitus vacua & nullius vigoris in lege existunt Et hoc parat' est verificare unde petit judicium si præd' Joh'es action' suam præd. inde versus eum habere seu manutenere debeat, &c.

Et præd' Joh'es dicit quod ipse per aliqua per præd' Laurent' superius placitando allegat' ab actione sua præd' inde versus ipsum Laurentium habend' præcludi non debet quia protestando quod præd' officium Præpositi Mar' non tangit seu concernit executionem Justitiæ idem Joh'es pro placito dicit quod insula præd' in partibus transmarinis existit necnon ex antiquo habitat' & possessionat' fuit per Hispanos Indos & alios homines alienigenos & forinsecos inimicos hujus Regni Angliæ extra ligeantiam sive gubernation' hujusce Regni quodq; anno mill'mo sexcentesimo quinquagesimo quinto insula præd' & inhabitant' ejusdem insulæ per vim' subditorum hujus Regni Angliæ virtute debita & sufficien' autoritate in ea parte habita commission' conquest' & in subjection' reduct' fuerunt quodq; ab inde continue postea hucusq; insula præd' necnon inhabitantes & incolæ inde per jura leges & Statuta ejusdem insulæ propria & non per actus parliament' sive statut' hujus Regni Angliæ regulat' & gubernat' fuit & adhuc est quodq;

*Replicati-
on.*

*That the
Island
was con-
quered.*

*And are
governed
by their
own Laws,
and not by
the Sta-
tutes of
England.*

quodq; executio officii præd. eandem insulam & incolas inde tantummodo concernit & in ead. insula solummodo executur. & non alibi & hoc idem Johannes parat. est verificare unde petit iudicium & debitum suum præd. una cum dampnis suis occasione detentionis debiti illius sibi adjudicari &c.

Barthol. Shower.

*Rejoinder
that be-
fore the
Conquest
they were
governed
by their
own Laws,
but not
since.*

Et prædict. Laurentius dicit quod bene & verum est quod ante conquestum Insulæ præd. in replicatione præd. Johannis superius mentionat. Insula præd. gubernat. fuit per leges & statuta & jura ejusdem Insulæ propria sed Insula præd. a tempore conquestus præd. semper fuit parcell. hujus Regni Angliæ & per leges & statuta hujus Regni Angliæ & non per præd. leges jura & statuta Insulæ præd. propria gubernat. & hoc parat. est verificare unde ut prius petit iudicium & quod præd. Johannes Blancard ab actione sua præd. inde versus ipsum habend. præcludatur &c.

fr. Wemberton.

To this Rejoinder there was a Demurrer, and the Defendant joined in Demurrer.

Continuancy.

Sed Quia Cur. Dom. Regis & Dom. Reginae nunc hic de iudic. suo de & super præmissis reddend. nondum ad-visatur dies inde dat. est par-

tibus præd. coram Dom. Rege & Dna. Regina. apud Westm. usq; diem Veneris prox. post Crast. Sanct. Trin. de iudicio suo de & super præmissis ill. audiend. eo quod Cur. dict. Dni. Regis & Dnæ. Reginae nunc hic inde nondum &c. (Continuand. usq; in Oct. Martini) Ad quem diem coram Dno. Rege & Dna. Regina apud Westm. ven. partes præd. per Attorn. suos præd. super quo vis. & per Cur. dict. Dni. Regis & Dnæ. Reginae nunc hic plenius intellectis omnibus & singulis præmissis maturaq; deliberatione inde habita videtur Cur. dict. Dni. Reg. & Dnæ. Reginae nunc hic quod placit. præd. per præd. Laurentium modo & forma præd. superius jungendo placitat. materiaq; in eodem content. minus suffic. in lege exist. ad ipsum Johan. ab actione sua præd. inde versus præfat. Laur. habend. præcludend. Ideo conf. est quod præd. Johan' recuperet versus præfat. (Def) debit' suum præd. nec non 11 l. pro damp. suis quæ sustin. tam occasione detent. debiti illius quam pro misis & custag. suis per ipsum circa sect. suam in hac parte apposit. præd. Johan. per Cur. dictor. Dni. Reg. & Dnæ. Reg. nunc hic ex assensu suo adjudicat. & præd. Laurentius in misericordia &c.

Blankard

Blankard *versus* Galdy.

2 Salk. 411.

THE Plaintiff was Probosc-Marshal of Jamaica, and by certain Articles made between him and the Defendant, he granted a Deputation of that Office to the Defendant for seven Years and an half, under the Yearly Rent of four hundred Pounds, and the Defendant gave Bond for the Performance of the Agreement, and now an Action of Debt was brought upon that Bond.

The Defendant pleaded the Statute of E. 6. made against buying and selling of Offices, and averred that this Office concerned the Administration of Justice in Jamaica, and that by Vertue of that Statute both the Bond and Articles were void.

The Plaintiff replied, That Jamaica was an Island inhabited formerly by the Spaniards, and governed by their own Laws ever since the Conquest thereof by the English, and that the Execution of the said Office only concerned the said Island, and the Inhabitants thereof, &c.

The Defendant rejoined and confesseth it to be a Conquered Nation, but that ever since the Conquest thereof it was Parcel of this Kingdom, and governed by the Laws of England, and not by their own Laws, &c.

The Plaintiff demurred to the Rejoinder, and the Defendant joined in Demurrer.

This Case was argued in Trinity Term by the Counsel, who drew the Pleadings; and the only Question was, Whether the Laws of England were in Force in Jamaica?

It was said that Acts of Parliament made in England do not bind the People of Jamaica, because they have no Representatives in our Parliaments; many Instances were given to maintain this Opinion, as, the Statute of 5 Eliz. hath no Force there, for by that Law 'tis enacted, That no Servant should be retained without a Testimonial, that the Justices shall assess the Wages of Servants, and that no Person shall exercise a Trade without being Apprentice for 7 Years: Now if this should be Law in Jamaica it would destroy all the Planters.

The Statute of Usury doth not bind them, for they allow there more for the Loan of Money than what is permitted by that Law.

Since the Acquisition of this Place it hath been taken Notice of by several Acts of Parliament, as, by 12 Car. 2. which is an Act for prohibiting planting Tobacco in England, where 'tis called a Colony and Plantation of this Kingdom in America, and in 15 Car. 2. an Act was made for encouragement of Trade; by which it was enacted, That no Commodity of the Growth of Europe shall be transported to the King's Plantations in America, but what shall be shipped in England. 12 Car. 2. cap. 26.

By the Statute of 22 & 23 Car. 2. 'tis called an English Plantation in America, which shews that the general Laws of the Realm do not extend to it, and therefore this Place being not mentioned in the Statute of Ed. 6. that Law hath no force there. Cap. 26.

And for a further Proof of this matter the Earl of Derby's Case was mentioned which was thus: 2 And. 116.

King H. 4. had the Isle of Man by Conquest, and by Letters Patents he granted it to Sir John Stanly in fee, in which Grant there was a Clause, That the said Isle should be governed by the Common Law of England: Afterwards the Earl of Derby made a Conveyance thereof to Uses, &c. and by his Last Will devised it, &c. and it was adjudged that none of the Inhabitants there had any Inheritance in their Lands besides the Earl and the Bishop; for being governed by their own Laws, neither the Statute of Uses or of Wills, or any other Act of the Parliament in England did bind them without express Mention thereof.

(2.) In the next Place it was said, That this is not an Office, which concerns the Administration of Justice; it was compared to a Bailiwick of an Hundred, and as such the Sale thereof hath been adjudged not to be within the Statute of Ed. 6. Besides, 'tis not averred how, or in what matter it concerned the Execution of Justice. 4 Leon. 33.

Econtra. It was argued for the Plaintiff, that in all Places there are some Methods and Rules of Government, and that after an absolute Conquest, the People are wholly at the Will of the Conqueror, who may make new or confirm their old Laws; but untill such Laws are made, they shall not be governed by their own Laws; because by the Conquest their Properties are lost,

lost, and their Government is dissolved, and by Consequence none of their Laws remain: therefore the Laws of the Conqueror must take Place; and 'tis very reasonable that what they enjoy by his Permission should be subject to his Government and Laws.

But 'tis as unreasonable that Englishmen should lose their Laws by a conquest of a Nation, which Laws are their Birthright, and which they carry with them wheresoever they go: for if they should, then by the Conquest of an Infidel Country, their Laws must remain, and the English Laws must be subject to those of the Alchoran.

But my Ld. Coke in Calvin's Case tells us by what Laws Kingdoms gotten by Conquest shall be governed, where he makes a Difference as to that Purpose between a Christian and Heathen Kingdom: for by the Conquest of the one, their antient Laws remain in force till new Laws are made by the Conqueror; but by the Conquest of the other, viz. by Christians, their Laws are wholly abrogated, because the Laws of the Heathens are contrary to those of God.

So that it seems not to be a Question now by what Laws the Spaniards or Natives shall be governed there: for their Country being possessed by Englishmen, the Laws of England must take Place till the King shall think convenient to make any Alteration.

In this Case the Property of the Soil is gained by the Possessor; but the Dominion and Government thereof belongs to the Crown; and to prove that the English Laws are in force there, this single Instance was offered, viz.

A Writ of Error did lye upon a Judgment given in Ireland before that Kingdom was governed by our Laws, which seems to be a parallel Case.

As to the Objection, that they have no Representatives in our Parliaments, it will signify very little in this Case, because the Statute of Ed. 6. was made long before the Conquest of the Island, and therefore the want of Representatives can be no reason why Statutes which were made before that Conquest should not bind there.

An Englishman accused there of Theft is to be tried by a Jury, so are all Contracts to be tried by the same Method, and not by the Laws of that Heathen Country: Now this is part of the Common Law of England, and if such Laws are used there, what Reason can be given why Statutes made here, should not likewise be of force there?

But 'tis plain that such Statutes do bind there, for the Statute of Limitations extends to all Contracts made in that Place.

The Heptarchy was subdued by the King of the West Saxons, who imposed Laws upon the conquered Nation, some whereof have obtained ever since, as likewise do those Laws which were made by William called the Conqueror, and it was a long Time before the People had any other Establishment.

In 2 R. 3. all the Judges of England met in the Exchequer-Chamber to consider whether the People in Ireland were bound by an Act of Parliament made in England; and they held they were not as to such Things which were done there: But that they were Subjects of England, and what they did out of Ireland must be conformable to the Laws of England. 7 Rep. 23.

And for this Reason 'tis not material whether Jamaica is part of England or not, so long as 'tis subject to the Dominion thereof.

'Tis true there are many Statutes which are not used there, as the Statutes of Usury, and of Labourers; but these are Laws not observed here; and therefore 'tis not to be objected that they do not bind in Jamaica.

(2.) It hath been urged in the next Place that 'tis not said in what manner this Office did concern the Administration of Justice; 'tis averred in the Pleading, that it did concern Justice, but 'tis never shewed how or in what manner.

It was also said, That ex vi Termini, this cannot be called an Office, 'tis only a Gaoler; but if that was admitted, 'tis still within the Statute, for no Gaoler is excepted out of the Act, but the Marshal of the King's Bench and the Warden of the Fleet.

Cur. The Laws by which the People were governed before the Conquest of the Island, do bind them till new Laws are given, and Acts of Parliament made here since the Conquest do not bind them, unless they are particularly named; the Reason is, because tho' a Conqueror may make new Laws, yet there is a Necessity that the former should be in force till new are obtained, and even then some of their old Customs may remain.

By the Statute of 27 H. 8. Wales was united to England, yet some of their Customs still remain; 'tis so likewise in Ireland, which Nation, tho' conquered, yet still retained their old Customs, as in the Case of Tanistry: So that there may be a Part of the Possessions of the Crown of England (as the Isle of Man is) and yet not governed by our Laws. Cap. 27.

And therefore it was held, that Jamaica was not governed by the Laws of England after the Conquest thereof, till new Laws were made; for they had neither Sheriff or Counties, they were only an Assembly of People which are not bound by our Laws, unless particularly mentioned.

In Barbadoes all Freeholds are subject to Debts, and are esteemed as Chattels, till the Creditors are satisfied, and then the Lands descend to the Heir; but the Law is otherwise here, which shews, that tho' that Island is Parcel of the Possessions of England, yet tis not governed by the Laws made here, but by their own particular Laws and Customs; and for these Reasons Judgment was given for the Plaintiff.

Matthew versus Ollerton.

DEbt upon an Award, and a Verdict for the Plaintiff; and it was now moved in Arrest of Judgment, and the Exception taken, was, That the Matter in Difference was referred to the Plaintiff himself, who made an Award, Sed non allocatur. And the Case of Serjeant Hards was remembered by Justice Dolben, (viz.) The Serjeant took a Horse from my Lord of Canterbury's Bailiff for a Deodand, and the Archbishop brought his Action, and it coming to a Trial at the Assizes in Kent, the Serjeant by Rule of Court, referred it to the Archbishop to set the Price of the Horse, which was done accordingly; and the Serjeant afterwards moved the Court to set aside the Award for the Reason now offered; but it was denied by my Lord Hale and per totam Curiam.

Robinson versus Watkyns.

THE Return of a Habeas Corpus was, viz. That London was an antient City, and that there was a Custom in the said City, for the Mayor, Aldermen, &c. to make Acts of Common Council for the better Government of the City; that the Customs of London were confirmed by Act of Parliament; that the said Mayor and Aldermen, &c. being informed that the Number of Hackney Coaches in London was greatly increased, and the Trade of the City thereby impaired, did order, That the Number of those should not exceed 400, and that none should be licensed

led afterwards, but Stage-Coaches; that if any Person not licensed stood to be hired, &c. the Offender should forfeit 40 s. for every such Offence, to be recovered by Action of Debt to be brought by the Chamberlain of the City; that before the Levying of the Plaintiff, whereupon the Defendant was taken, he stood with an unlicensed Coach in Cornhill to be hired, per quod actio accrevit, &c. and that the Defendant was taken upon the said Plaintiff, which is the Cause of his Imprisonment.

It was argued that this Act of Common Council was illegal; First, By considering the Nature and Extent of the Custom, and what Operation is made upon it by the Confirmation in Parliament: for that gave no new or farther Power, or any Thing more than what they had before by the Custom, which was confirmed but not enlarged.

Acts of Common Council in London are no more than By-Laws, they are founded upon their Customs used in the City; now they have no Custom to warrant this By-Law, and therefore 'tis void; for it being made by a Corporation for a private End, it must have a Custom to support it: But if it had been for a publick Good, as for repairing of an Highway, &c. then it might have been well without a Custom.

5 Rep. 63.
8 Rep. 115.

Then as to the Restraining part of this Law 'tis void, because 'tis against the Liberty of the Subject to be hindered in his lawful Occupation, and so it was adjudged in the Case of Ipswich's Case.

11 Rep. 54.

In the Case of Norris and Stupes, the Question was, If a Town Corporate having no Prescription to exclude others, could by any particular Privilege make a Law to obstruct all Persons from using of a Trade there, having not been Apprentices in the Town? This seemed to be against the general Liberties of the People; and therefore of no Force to bind Strangers acting within the Liberties of the Place contrary to such Law; but it did not receive any Determination.

Hob. 211.
Roll. Abr.
tit.
By-Laws,
pl. 4.

King Ed. 3. by Letters Patents confirmed in Parliament, gave Power to the Mayor and Commonalty of London to make By-Laws for the better Regulating of the City, and they made a Law, that no Carman should go into the City without Leave of the Wardens of a particular Hospital under a certain Penalty, and this was held void, because it restrained Men from using of their Trades, and was in the Nature of a Monopoly.

1 Roll. Abr.
364. pl. 5.

'Tis true, in 32 Eliz. an Action of Debt was brought in London, grounded upon an Act of Common Council, viz. That if any Citizen, Freeman, or Stranger within the said

City Hall offer Broad Cloath to Sale there before 'tis brought to Blackwell-hall to be viewed, That he shall forfeit 6 s. 8. d. for every Cloath, and this was held a good Law to bind Strangers; but the Reason of that Judgment can have no Influence upon this Case, because that was a good Law made to prevent Frauds in selling of Cloath not vendible: Besides, it was told that they had a Power by their Custom to make such a Law, which is wanting here; and therefore it was prayed that no Procedendo might be awarded.

Econtra. The general Question is, Whether 'tis lawful to restrain the Number of Hackney-Coaches in London by an Act of Common Council, which was admitted to be no more than a By-Law? And it was argued that this By-Law was lawful.

First, It was insisted that a By-Law may be good in part, and hold for the rest, and that tho' there was no particular Custom to support this Law, yet it was good as founded upon the general Custom of London to supply all Defects of good Government within the City.

8 Rep. 126.

The Customs of that City are very antient, and have been greatly regarded in the Courts of Justice, they have been so far from being construed to restrain Trade within their Liberties; that they have been allowed even against Common Right, and against the Rules of Law: As, a Custom to arrest a Man for Debt before it becomes payable; this hath been held good, for 'tis to make the Defendant find better Sureties.

* 1 Roll.
Abr. 364.

All By-Laws made for a publick Good, are justifiable, for as such they can be no Burden to the People: 'Tis true, where they are made for private Ends, or for Gain, 'tis otherwise: but that is not this Case, because by this Law no private Benefit can accrew to the City; 'tis a Law made to prevent a publick Nuisance; and this was the Reason of the Judgment in * Hayward and Pain's Case, which was a By-Law to restrain the Carmen from going into the City without a Licence from the Wardens of a particular Hospital, because it was a Law which had no Respect to a publick Good, but to the Profit of the Hospital.

8ld. 284.

But for an Authority which comes near the Case in Question, this was cited; viz. a By-Law was made in London, That there should be but 420 Carts let to hire under penalty of 40 s. for every one above that Number, to be paid by the OWNER: Now this was a Law made in Restraint of a lawful Employment, yet it was held to be good: For if the

the Number should not be restrained it might prove a Nuisance by stopping up the Streets, and by hindring the Passages.

It hath been objected, That these are different Cases, because such By-Laws which have been held good have been founded upon Custom; but no Custom can extend to Coaches which have been newly set up.

But what Reason can be given why a By-Law should not be good, which is founded upon a general Custom to supply all Defects of former Laws?

Many Instances may be given where such By-Laws have been held good, viz. A By-Law made in London, That none shall make or use a Hot-press there was held good, as founded upon the general Custom; so are all the By-Laws made against Butchers, prohibiting them from standing in certain Streets under a Penalty.

It cannot be objected, That this is a Law to licence a Nuisance, because the City hath adjudged 400 Coaches to be a convenient Number; neither can it be said to be a Monopoly, because 'tis only a Restraint of Persons beyond such a Number to exercise an Employment in a particular Place, which was always allowed to be good.

Neither can it with any Reason be objected against the Authority of the Mayor and Aldermen to make this By-Law, viz. That Hackney-Coaches have been regulated by a Statute-Law, which had made it needless if it could be done by a By-Law; because Acts of Parliament have been made in Confirmation of the Common Law, so that Things tho' good in themselves may have Occasion to be supported by the Legislative Power.

And lastly, for a late Authority the Case of Gavel and Taker was cited, which was a By-Law to restrain Carts to such a Number as should be licensed by the Company of Woodmongers; and this was adjudged in the Common Pleas, Anno 2 Jac. 2. to be a good Law, which Judgment was affirmed in the Exchequer Chamber. Adjournatur.

1 Roll. Abr.

365.

Godb. pl.

106, 126.

1 Bulst. 11,

12.

2 Brownl.

177.

8 Rep.

125. b.

Cro. Eliz.

203.

* 14. Car. 2.

cap. 2.

Pitman *versus* Bidlecombe.

DEbt upon Bond, the Condition thereof was, That if the Defendant shall pay all such Charges as shall appear to be due to John Willis (who was Attorney for the Plaintiff) in prosecuting the Defendant at his Suit, That then, &c.

The Defendant pleaded, That it did not appear what was due to the Attorney, &c.

The Plaintiff replied, That 9 l. was due to the said Attorney, of which the Defendant had Notice but had not paid it.

March 108,
156.
1 Roll. Abr.
467.

The Defendant rejoined, That it did not appear what was due, &c. and traversed that he had Notice thereof. Upon Demurrer Judgment was given for the Plaintiff, because the Attorney was a Stranger to the Action, and the Defendant ought to take Notice at his Peril what was due to the Attorney; and so it was adjudged in the Case of Dewel and Wilmot.

Hob. 51.

'Tis true, where the Matter falls under the Cognizance of the Plaintiff himself, there he ought to give the Defendant Notice; as an Assumpsit to pay for Part of the Goods after the Rate the Plaintiff should sell the rest; there Notice must be given both of the Sale and Price; but that is not like this Case.

Salter *versus* Brunfden.

Wilt' ff.
An Acti-
on upon
the Statute
of Distres-
ses for
Rent for
distrain-
ing where
no Rent
was due.

Nicholaus Salter queritur de Johanne Brunfden & Johanne Kite in Custod. Mar. &c. de eo quod ipsi decimo sexto die Septembris Anno Domini 1691. apud &c. in Com. præd. vi & armis &c. bona & catalla videlicet quadraginta quarteria hordei ipsius Nicholai ad valentiam quadraginta librarum adtunc & ibidem invent' nomine distractionis pro redditu per ipsum Nicholaum præfat. Johanni Brunfden super dimissionem Messuagii & quarundem terrarum eidem Nicholao per ipsum Johannem Brunfden antetunc fact. debit. & in aretore supposit. & pretenf. colore cujusdam Actus parliamenti in hujusmodi casu nuper edit. & provis. ceper. & distriker. & bona & catalla illa sic distract. adtunc & ibidem detinuer. quosq; postea scilicet vicesimo tertio die Septembris Anno Domini 1691. supradicto præd. bona & catalla colore actus ill. vendider. & disposuer. ubi revera & in facto tempore captionis bonorum & catallorum præd. aut tempore venditionis eorundem nullus redditus per ipsum Nicholaum eidem Johan. Brunfden debit. aut in aretore fuit & alia enormia eidem Nicholao adtunc & ibidem intuler con-

tra pacem dict. Domini Regis & Dominae Reginae nunc & contra formam statuti in hujusmodi casu edit. & provis. unde dicit quod deteriorat. est & dampnum habet ad valentiam Centum librar. Et inde produc. secundam &c.

Et modo ad hunc diem sci. *One Defendant* diem Veneris prox. post Crast. *pleads not* sanct. Trinitatis isto eodem *guilty, and* Termino usque quem diem *there is* præd. Johannes Brunfden & *Judg-* Johannes Kite habuer. licenc. *ment by* ad billam præd. interloquend. *defiant a-* & tunc ad respondend. &c. co- *gainst the* ram Domino Rege & Domi- *other.* na Regina apud Westm. ven. tam præd. Nicholaus Salter per Attorn. suum præd. quam præd. Johannes Kite per Antonium Ettrick Attorn. suum Et idem Johannes Kite defend. vim & injuriam quando &c. Et dicit quod ipse non est inde culpabilis Et de hoc ponit se super patriam Et præd. Nicholaus similiter &c. Et præd. Johannes Brunfden ad eundem diem licet solempniter exact. non ven. nec aliquid dicit in barram sive præclusion. action. prædict. ipsius Nicholai per quod idem Nicholaus reman. inde versus eundem Johannem Brunfden indefens. &c. ob qd. considerat. est qd. præd. Nicholaus dama-

na

na sua versus præfat. Johan. Brunſden occasione tranſgr. præd. recuperare debeat ſed quia Cur. dict. Dni. Regis & Dnæ. Reginae nunc hic incognit. exiſt. quæ damna idem Nicholaus occasione tranſgr. præd. per præd. Johan. Brunſden ut præfertur fact. ſuſtinuit Ideo tam ad triand. exit. præd. inter præd. Nicholaum & præfat. Johannem Kite ſuperius junct. quam ad inqui-

rend. quæ damna præd. Nich. occasione tranſgr. præd. per præfat. Johannem Brunſden ut præfertur fact. ſuſtinuit ven. inde Jur. coram Dno. Rege & Dna. Regina apud Weſtm. die Mercurii prox. poſt tres ſeptimanas ſanctæ Trinitatis Et qui nec &c. ad recogn. &c. Quia tam, &c. Idem dies dat. eſt tam præfat. Nicholao quam præfat. Johanni Kite ibidem &c.

This was an Action brought upon an Act of Parliament lately made, empowering the Landlord to make Sale of Goods distrained for Rent after a certain Time therein limited, in which Act there is a Proviso (viz. That in case a Distress or Sale shall be made for Rent (by Colour of that Act) pretended to be due, where in Truth no Rent is in arrear, &c. to the Person distraining, that the Owner of the Goods shall have an Action of Trespass to recover double the Value.

The Plaintiff had a Judgment by Default, and it was now moved in Arrest of that Judgment, and the Reason offered was, That there must be a Lessor and Lessee to bring this Case to be within the Act, and that if there is no Demise, the Act gives no Remedy, because 'tis expressly declared therein, viz. That where Goods shall be distrained for Rent reserved, and due upon any Demise, Lease, or Contract, &c. the Person distraining may sell the same, &c.

Now there is no Demise sufficiently set forth in this Declaration, neither is it said, That the Goods were distrained for Rent arrear; but that they were taken nomine districtionis, which is not a good Averment that they were distrained.

But the Court held the Declaration to be good.

Rex & Regina *versus* St. John's College.

By the Statute of 1 W. & M. made for the Abrogating of the Oaths of Allegiance and Supremacy, and appointing of other Oaths, 'tis enacted, That if any Governour, Head or Fellow of any College or Hall in either of the Universities shall neglect or refuse to take the Oaths thereby appointed, for six Months after primo Augusti, and before such Person or Persons as by any Act or Acts are authorized and impowered to tender the abrogated Oaths, &c. that then the Government or Fellowship of every Person so neglecting or refusing, shall be void.

The abrogated Oaths were enjoined by the Statute of 25 Car. 2. to be taken by all Persons in Office, either in the Court of Chancery, or King's Bench, or Quarter-Sessions for the County where he or they shall inhabit. Cap. 2.

Several fellows of St. John's College in Cambridge had not taken the Oaths pursuant to the Statute of anno 1 W. & M. and thereupon a Mandamus issued out of this Court, directed to Humfrey Gower, who was Head of the said College, and to the fellows and Masters there, setting forth the said Act, and that such fellows had not taken the Oaths, and that sicut informamur they still continue in the quiet Enjoyment of their Fellowships; therefore by this Writ they were commanded to amove them; but 'tis not said vel causam nobis significetis.

The Return to which Mandamus was (viz.) the Statute of 25 Ed. 3. whereby 'tis enacted, that none shall be put out of his freehold, unless he be duly brought in to answer and be forejudged by the Course of the Law; and likewise the Statute of 28 Ed. 3. That no Man shall be put out of his Lands or Tenements, without being brought to answer by due Process of Law, that the twenty Persons mentioned in the Writ were, Anno primo W. & M. sworn fellows of the said College, and were seized of a freehold in their Fellowships, and that since the making of that Statute they were not brought to any Trial, &c. Cap. 4.
Cap. 3.

Then it was returned, quod in nullo modo constat, that they had not taken the said Oaths.

It was further set forth, That the College was founded by Margaret Countess of Richmond, That the Bishop of Ely for the Time being, was by the Laws of the foundress appointed Visitor: That by some particular Statutes of the

College which were recited in the Return) 'tis provided, that for great Crimes the Master, by the Consent of the Senior Fellows, upon Examination and Enquiry, may proceed to an Expulsion, and that they cannot expel for any other Cause, &c.

This Return was not subscribed by any Person, neither was the Common Seal of the College affixed to it, which (as it was insisted on) ought to be done, because without it non constat de persona against whom to bring an Action if the Return should be false; but it was held that the Seal was not material, because the Writ was directed to the Head of the College by Name, therefore he is the Person who is to make the Return, and by Consequence against whom the Action will lie, if it is false.

Those who argued against the Writ held,

(1.) That it was illegal, and not warranted by any Law.

(2.) Admitting the Writ to be good, then the Matter returned is a sufficient Excuse.

7 Rep. 20.
Vaugh. 401.

* Sid. 94,
152.

As to the first Point; a Mandamus hath always been a Remedial and beneficial Writ to those who have been oppressed, especially where the Party grieved could not maintain an Assize; such Writs are called by Sir Edward Coke, in Calvin's Case, Brevia mandatoria remedialia; and they have often been allowed to restore Men to Places of which they have been dispossessed, * rather than to turn them to Actions on the Case to be recompensed by a Jury in Damages.

3 Bulst. 122.

Therefore the proper Office of this mandatory Writ is to restore and keep Men in their several Places and Employments, and not to displace them; but this now brought, is so far from being a Remedial Writ, that 'tis very mischievous to the Parties, for 'tis to remove them, which is directly contrary to the Nature of the Writ, and to the Opinion of the Court in Shuttleworth's Case, 11 Jac. where it was held, That a Mandamus was only to be allowed in Cases of Restitution, where there have been bad and undue Removals.

Sid. 107.

Sid. 433.

This Court hath been always very careful in granting these Writs, especially where no Precedent (as in this Case) can be produced to warrant it; and therefore it was denied to be granted to make a Man free of a Corporation, who had served an Apprenticeship there, tho' the Court held it very reasonable that the Person should have his Freedom; and it was likewise denied to the Spiritual Court, who refused to deliver a Will to the Heir after it was proved in common form, without a definitive Sentence; and the Reason

Reason in both Cases was, because no Precedent could be shewed, that ever a Remedial Writ was granted in such Matters; and if no Precedent, then there can be no such Law. Plowd. 262. a.

'Tis admitted by this Writ it self, as well as by the Return, that the Parties had a Freehold in their Fellowship; and if the Law is more favourable in any one Thing than in another 'tis in the Case of a Freehold; and therefore was Magna Charta made to preserve the due Course of the Common Law to which every English Man hath a native Right; but this Writ doth not only infringe that Right, but doth subvert the very Course of the Law which favours every Man's Possession; 'tis to turn People out of their Freehold, who are no Parties to the Writ; 'tis to punish a Man without being heard, and 'tis to execute a Judgment when it doth not appear that any Judgment was given; but sicut informamur, which is a Suggestion of Persons unknown against the Properties of Men, and was never yet allowed.

The Law is so very careful that Persons shall not be dispossessed before they are heard, that Parties, or Parties to a Record (as an Heir or Executor) shall not have an Action of Debt upon a Judgment in a personal Action, or a Scire Facias in a real Action to have Execution, till after the Year and Day, that the Defendants may be called in and have an Opportunity to be heard what they can say to defend their Possessions; and this, probably was the Reason of making the Statute against forcible Entries; for tho' a Man is in Possession by an illegal Title, yet he shall not be turned out before he is heard. 2 Inst 471.

But here a Possession is endeavoured to be removed by a Suggestion or Information without an Inquisition by a Jury, which is against the known Rules of Law, and expressly against these Statutes set forth in the Return.

It had been much better if the Writ had commanded them generally to put the Law of 1 W. & M. in Execution; but as this Case is, 'tis like a Mandamus to an inferior Court, commanding them to give Judgment *parte inaudita altera*, which would be very unjust, tho' the Party for whom the Judgment was given had a Right.

But this Method of Proceeding was never intended by the Act of 1 W. & M. for by that Law these Persons are only disabled to hold their Fellowships which are made void, but the Consequences thereof are left to the ordinary Methods of the Law.

Those who have any Ecclesiastical Benefice are likewise deprived by this Act, if they refuse or neglect to take the Oaths beyond the Time therein limited, but it doth not di-

rect the Patrons to present after such Depzivation; and no Man will say that a Mandamus doth lie to a Patron for that Purpose; this would be festinum Remedium; and yet if a Person presented to a Benefice, refuseth to read the 39 Articles, or cometh in by Simony, his Living is as absolutely void as these Fellowships.

If this should be admitted to be Law, how easy would it be to displace the Officers of any Corporation by such Writs? for 'tis but suggesting an Offence, and the Business is done, the Consequences whereof would be so fatal, that it would out-do the late Quo warrantos, for there the Parties had Liberty to come in and plead.

In this Case the Defendants cannot claim to be heard by the Head of the College and the other Fellows, because no such Thing is commanded by the Writ, but absolutely to turn them out; and if the Master had Power to examine this Matter, it cannot be upon Oath; for he hath no Authority to administer it, neither doth the Writ mention that he and the Fellows have Power to remove these Persons, which ought to have been alledged.

Now if the Suggestion in the Writ should be false, and the Fellows thereupon turned out, they have no legal Remedy to be restored again; for they cannot have a Mandamus; and an Appeal will not lie, because there is a local and proper Visitor; neither will an Assize lie, because 'tis not a sole Corporation; neither can an Action on the Case be brought against Dr. Gower, because what he hath done, is by the King's Command in the Writ, which is a sufficient Authority to justify him.

The Reason of granting these remedial Writs, is for Want of other Means of doing Right to injured Persons, but here can be no Pretence of a Failure of Justice, because the College is subject to a Visitor who hath Power to execute the Laws of the Founder; and therefore a Mandamus will not lie: It hath been denied to restore a fellow of a College upon undue Expulsion; and if so, no Reason can be given why it should be allowed to expel one who is not well admitted to a Fellowship, or unduly continued after a good Admission.

This is the proper Work of the Visitor, and not of this Court; for the College is subject ad aliud examen, therefore the Writ ought to have been directed to him who hath Power of examining and correcting the Fellows, and likewise of executing the Powers in this Act.

If therefore this is a Remedial Writ, and no Precedent can be produced where it hath been granted to expel Persons,

but always to restore them; if it will not lie where there is a local and proper Visitor; if the Law so far labours a freehold that no Man shall be dispossessed thereof by a bare Suggestion without a Trial, then this Writ now brought must be illegal.

'Tis no Objection to say, that this Court hath granted a Mandamus to abate a Nuisance without a Trial; 'tis true, it hath been done, but then the Fact hath been made certain either by Matter of Record, or by a View or Presentment of a Grand Jury; so it was in Jacob Hall's Case, who was presented by the Jury for a Nuisance in the High-way, tho' it was at Charing-Cross in the View of the Justices coming to Westminster-Hall.

'Tis true also, that this Court hath Power to form Writs to compel the Execution of Acts of Parliament, but so as always to take care to preserve the Rules of the Common Law.

(2. Point.) Admitting this Writ to be good, then the Matter returned is a sufficient Excuse.

The Return begins with the Statute of 25 Ed. 3. That no Man shall be turned out of his Freehold but *per legem terre*, viz. by due Process of Law, which is the same Thing; and this must be (according to my Lord Coke) by Indictment or Presentment of good and lawful Men, which was not done in this Case, and therefore against Law; for this Statute is declaratory of the antient Common Law.

'Tis true, the Statute of 11 H. 7. was made directly against this antient Law, which gives Power to Justices of Assize or of the Peace upon a bare Information to judge Offences without the Presentment of a Jury; by which Law this Nation suffered many Oppressions for the Space of eight Years, and therefore Anno 1 H. 8. that Statute was repealed. Cap. 3.

Next 'tis returned, That it doth not appear to them that the fellows had not taken the Oaths, and this may be very true; for by the Act of 1 W. & M. they are enjoined to be taken before such Person or Persons, who by any former Law were impowered to tender the abrogated Oaths; now the fellows of Colleges were not obliged to take the Oath of Supremacy in any Place by any other Act than that of 7 Jac. which appoints it to be taken in the Halls of their respective Colleges; yet this Statute was made for their Ease; there are no negative Words in it to punish them if taken elsewhere; and being a penal Law, 'tis well fulfilled if they take the Oaths in any other Place before a proper Person Cap. 6.

Person who hath Authority to administer the same; and therefore since they may be taken in many Places it may not appear to those who made this Return that they were not taken in some of these Places; and if it doth not lie in their Knowledge, then Ignorance will be a good Excuse.

There is no Act of Parliament which enjoins the Head of a College to tender, or the Fellows to take the Oaths before him; for by the Statute of 5 Eliz. Graduates in the Universities are appointed to take the Oaths in an open Place, before a convenient Assembly to witness it, or before such Persons who have Authority by common Use to admit them to any Degree: Now 'tis not the Head of a House, but the Convocation which admits to Degrees in the Universities, and there they ought to take the Oaths either in the King's Bench, or at the Quarter Sessions, &c.

But admitting they are found to take the Oaths in the College-Hall. yet the Master and Scholars are not bound by the Act to be present, neither is the Master at his Peril to make any Entry or Memorandum of it.

Then they return that they have a local Visitor who hath Power to correct the Offences of the College: Now all such Eleemosynary Corporations are visible in their very Nature and Creation; and if the Founder doth not give the Visitor an Authority to determine such Offences, yet 'tis incident to his Office; so that there can be no Necessity of having any Recourse to an extraordinary Remedy, because the Visitor hath as much Power to remove an Offender by a publick Act of his own, as by the private Laws of the College.

He hath a peculiar and legal Power exclusive of all others to see that those Persons where he is Visitor do conform to the Laws of the Land, and that none be continued there but those who are truly Fellows of the College: So that if the fact suggested in this Writ is true, then they are no Fellows; if so, the Visitor, and not this Court, must remove them.

But if a Mandamus will lie, Mr. Attorney is too early in bringing this, because it doth not appear that the Visitor was obstructed to make his Visitation, or that Application had been made to him for that Purpose, and that he refused to come; or that his Power was too weak; and this makes the Case more extraordinary, because the Law requires a Method in all its Proceedings, and deprives no Man of that Authority which he lawfully hath; and therefore where it gives an Appeal to the Sessions, the Matter is never begun originally there, for that would be to deprive the Justices
of

of the Peace of their legal Jurisdiction; so likewise a Writ of Error out of Ireland to the Parliament here, is never allowed till the Matter hath first received the Judgment of B. R. in Ireland.

And lastly they return they have not Power to expel but for great Crimes mentioned in the Statutes of the College; so that if they have any Power it must be either by Prescription or Charter; they cannot have it by Prescription, because the College was founded within Time of Memory; and they have it not by Charter, because not warranted by their Statutes.

So that if these Persons are expelled from their Freeholds it must be done by those who have no Power, and before they are called to answer the fact of which they are accused, and likewise before they are tried per judicium parium vel per legem terræ, &c. for which Reasons it was prayed, That no peremptory Mandamus might go.

Econtra. The Writ is good, and the Proceedings thereon are legal for these Reasons.

(1.) From the Law it self and the Subject-matter upon which it was made.

The Act of 1 W. & M. is a Law made for acknowledging the Right and Sovereignty of their Majesties; 'tis thereby enacted, That all Persons shall be obliged to take the Oaths, &c. 'Tis a Law made for the Security of the Government, and for suspending of the Persons and making of their Places void who refuse to give Obedience to it.

The open Hall of the College is the Place appointed by the Statute of 1 Jac. therefore they who made the Return, cannot be ignorant of the Neglect; 'tis an Offence in those who have the Government of the College to suffer Men to enjoy their Fellowships who have not taken the Oaths, and 'tis a weak Excuse to say, That they had no Notice of this Matter; for the Act doth not put it under any formal Examination, neither are those Persons to have any Notice given of their Duty; the Statute is sufficient Notice, and the Neglect of that Duty incurs a Forfeiture.

'Tis a Breach of the Law, and of the Peace of the Government, 'tis an Encouragement to ill Men to contemn Authority; and 'tis for these Reasons that a Mandamus is good, for the Offenders do as much as in them is to undermine the Government, and do despise the Wisdom and Authority of a Parliament.

(2.) The

4 Inst. 71.
1 H. 4. 19.
8 H. 6. 29.

(2) The Court of King's Bench hath a sufficient Authority to see this Law put in Execution, for the King having an executive Power in him for that Purpose hath transmitted the same in a more special Manner to B. R. for the Preservation of Right and Justice; and therefore this Court hath a Sovereign Jurisdiction to correct all Matters tending to the Breach of the Peace, which is applicable to this Offence, and the Remedy now desired is proper.

It was never yet doubted but that this Court might remove all common Nusances, or any Thing done to the Prejudice of the Publick, and certainly a greater Nuisance to the Government cannot be than for these Persons to continue in the Enjoyment of their fellowships in Opposition to the Laws, and contrary to a positive Statute which hath made this Place void.

Ryley pl.
parliam. 601.

Anno 19 R. 2. a Writ was directed to the Chancellor of Oxon to expel Lollards, and particularly a Man mentioned in that Writ; so that it was then allowed to remove an ill Man, and it was obeyed by the Universities; and this may be an Answer to that Objection made by the Counsel on the other Side, that a Mandatory Writ hath been often granted to restore, but never to turn a Man out of his Freehold.

As to that part of the Return which sets forth the Statutes of Ed. 3. 'tis in the Nature of a Demurrer, by which they would dispute the Jurisdiction of this Court to grant the Writ, 'tis to deny the Statute of 1 W. & M. to be an Act of Parliament, or that 'tis Lex terræ; but 'tis by this Law that the Avoidance is made, and if a Mandamus will lie to restore a Man to a Place of which he is dispossessed, it will lie as well to turn out such who are actually deprived by the Law of the Land, and in such Case it would be to no Purpose to call them in to answer, or to have a Trial per judicium parium: for the Act it self is a sufficient Conviction, of which they are bound to take Notice.

Then as to the Return of the visitatorial Power, viz. that for that Reason a Mandamus would not lie, it was said, That it hath been often settled to the contrary.

'Tis true, where local Statutes are made to punish Offences, such are properly cognizable by the Visitor, and this Court doth not usually interpose; but this is an Offence made by Act of Parliament, which neither the Visitor, or Master, or Fellows of this College are proper Judges to determine.

'Tis objected, That this is a peremptory Writ, commanding the Thing to be done without saying, vel causam nobis significetis, &c. but 'tis said that these Persons had not taken the Oaths, sicut informamur, and there are several Precedents to warrant this form, but none were mentioned.

Curia. This Statute of 1 W. & M. hath a Reference to that of 7 Jacobi, the one appoints the Oaths to be taken before such Persons, who by any Act were authorized to tender the Oaths of Allegiance now abrogated, and by the other the Fellows of Colleges quatenus fellows are obliged to take them in the open Hall, before the President; and therefore the Members must and ought to take Notice of such publick Acts done in their College.

This cannot be taken to be a peremptory Writ, because it sets forth the fact sicut informamur, which Words must go to the whole, and such a Construction must be made when the Writ is grounded upon a Suggestion as this is, but when upon a Judgment, then 'tis otherwise.

The Visitor is made by the Founder, and is the proper Judge of the private Laws of the College; he is to determine Offences against those Laws. But where the Law of the Land is disobeyed this Court will take Notice thereof notwithstanding the Visitor, and in this Case the proper Way to put it in Execution is by this Writ of Mandamus. Sed Adjournatur.

Waples *versus* Bassett.

A Special Action upon the Case was brought against the Defendant for not keeping of a Bull and Boar, and upon a Demurrer to the Declaration these Exceptions were taken to it, viz. he did not set forth that the Defendant was obliged to keep them either by Custom, Prescription, or otherwise; neither hath he alledged any particular Loss or Damage by his Cattle not encreasing, or that the Defendant being Rector of a Church ought to find a Boar in Consideration of paying of him Tithes; for which Reasons the Declaration was held ill.

1 Roll. Abr.
109, 559.
Cro. Eliz.
569.
Moor 355.

Pearson *versus* Garrett.

Trin. 5 Willicelmi & Mariæ, Rot. 177.

*An Acti-
on upon a
Note of 60
Guineas
when the
Defen-
dant
should
marry
such a
Person,
upon
which the
Plaintiff
declared
as upon a
Bill of Ex-
change.*

*The Cu-
stom set
forth.*

Johannes Pearson queritur de Johanne Garrett in Custod. Marr. &c. pro eo videlicet quod cum Civitas London est antiqua Civit. cumq; etiam in eadem Civitate videlicet apud Paroch. beatæ Mariæ de Arcubus in warda de Cheape habetur necnon a toto tempore cujus contrar. memoria hominum non existit habebatur quædam antiqua & laudabilis consuetudo approbat. & usitat. in eadem inter mercatores **Et alias personas in eadem Civitate residen** videlicet quod si aliqua persona in eadem Civitate residen. fecerit aliquam Billam five notam in scriptis sub manu sua subscript. & per eandem billam five notam promitteret solvere alicui personæ aliquam denariorum summam ad aliquod tempus vel aliqua tempora in hujusmodi billa five nota mentionat. talis persona quæ hujusmodi Billam five notam fecerit per hujusmodi promissionem & consideration. præd. inter mercatores & alias personas præd. sic ut præfertur usitat. & approbat. onerabilis esse consuevit ad solvend. hujusmodi denariorum summam in hujusmodi billa five nota

mentionat. hujusmodi personæ cui promissio solutionis inde per hujusmodi billam five notam facta fuit fore solvend. ad tempus five tempora in & per hujusmodi billam five notam pro solutione inde denotat. secundum promissionem suam præd. cumq; vicesimo primo die Octobris Anno Regni Domini Willicelmi & Domini Mariæ nunc Regis & Reginæ Angliæ &c. quarto apud London præd. videlicet in Parochia beatæ Mariæ de Arcubus in warda de Cheap præd. idem Johannes Garret fuit persona residen. in Civitate London præd. & sic ibidem residen. eodem vicesimo primo die Octobris Anno quarto supradicto apud London præd. in Parochia & warda præd. per quandam notam in scriptis sub manu sua subscript. promisit solvere eidem Johanni Pearson vel assign. suis sexaginta pecias auri cuncti Anglice **Threescore pieces of Guinea twenty Shillings pieces of Gold**, infra duos menses prox. post ipse præd. Johan. Garret cuidam **Elizabeth Pretty legitime maritat. foret**, videlicet quinquaginta pecias inde pro seipso prædicto Johanne Pearson

*The note
made*

*To be paid
upon Mar-
riage.*

*The De-
fendant
named.*

son & decem pecias inde pro uxore sua & idem Johannes Pearson in facto dicit quod præd. Johannes Garret postea scilicet vicesimo octavo die Februarii Anno Regni dicti Domini Regis & Dominæ Reginæ nunc quinto apud London præd. in parochia & warda prædictis præfat. Elizabethæ Pretty legitime maritat. fuit per quod & vigore consuetud. præd. prædictus Johannes Garret devenit onerabilis ad solvend. eidem Johanni Pearson præd. sexaginta pecias auri secundum promissionem suam præd. ac superinde in consideratione præmiss. præd. Johann. Garret adtunc & ibidem scilicet præd. vicesimo octavo die Februarii Anno quinto supradicto apud London præd. in parochia & warda præd. super se assumpsit præfatoq; Johanni Pearson adtunc & ibidem fideliter promisit quod ipse idem Johannes Garret præd. sexaginta pecias auri eidem Johanni Pearson infra duos

menes prox. post maritagium præd. habit. bene & fideliter solvere & contentare vellet pd. tamen Johannes Garret promission. & assumption. suas præd. minime curans sed. machinans & fraudulenter intendens eundem Johannem Pearson in hoc parte callide & subdole decipere & defraudare præd. sexaginta pecias Auri seu aliquem inde denarium præfat. Johanni Pearson nondum solvit nec ei pro eisdem hucusq; aliquantulum contentavit licet ad hoc faciend. præd. Johannes Garret postea scilicet secundo die Maii Anno quinto supradicto apud London præd. in parochia & warda prædictis per eundem Johannem Pearson requisit. fuit sed ill. ei hucusq; solvere seu proinde aliquantulum contentare omnino recusavit & adhuc recusat unde idem Johannes Pearson dicit quod deteriorat. est & dampnum habet ad valentiam Centum librarum & inde producit sectam &c.

To this Declaration the Defendant demurred, and the Plaintiff joined in Demurrer.

The Action was brought upon a Note for the Payment of 60 Guineas when the Defendant should marry such a Person, &c. in which the Plaintiff declared as upon a Bill of Exchange setting forth the Custom of Merchants, &c.

The Exceptions taken were, viz. That the Plaintiff doth not aver that he was a Merchant, or that the Note was made secundum consuetudinem Mercatorum; neither hath he laid any consideration.

This is not such a Custom amongst Merchants of which this Court is obliged to take Notice as Part of the Law of the Land; for in Truth there is no such Custom, 'tis only an Agreement founded upon a Brokage, and therefore cannot be within the Custom of Merchants; neither was there ever yet any Precedents to pay Money upon such a collateral Contingency.

'Tis no more than a voluntary Note given with a present Consideration, and if such should be allowed to be within the Custom of Merchants, then every thing which is given without a Consideration may be as well within the Custom, which would quite change the Law.

Econtra. The Question is, Whether this Custom is good or not? 'Tis sufficiently alledged in the Declaration, 'tis not laid to be inter Mercatores only, but inter alias personas residentes, &c. and if such a Custom can be good, then 'tis admitted to be so by the Demurrer.

D^r. Witherly's Son brought the like Action upon a Note, and he was a Gentleman, and no trading Merchant, but travelling into France, and had Judgment, which was affirmed in the Exchequer-Chamber.

No Reason can be offered why such a Note should not bind as well as a Bond, since the Consideration for which it was given, was very just; for 'tis lawful for one Man to help another to a Wife.

If the Note had been given by way of Commerce, it had been good, but to pay Money upon such a Contingency, cannot be called Trading, and therefore not within the Custom of Merchants. Judgment was given for the Defendant.

Gale *versus* Till.

3 Levinz.
375, 396.

An Administrator brought a Writ of Error to reverse a Judgment against himself, but the Judgment was affirmed; and now a Motion was made that he may pay Costs; because it was his own Fault to bring a Writ of Error to delay the Plaintiff, and to put him to Charge; and where an Administrator is guilty of any Wrong or Injury done, which lies within his own Knowledge, and which he might prevent; there if Judgment be against him, Costs must be paid.

As if an Administrator should bring Trover and Conversion for the Goods of the Intestate, and the Conversion happens to be after the Administration granted, and Judgment against him, in such Case he shall pay Costs. Cro. Car. 219.
Litch. 220.

'Tis true, there is a Case reported by Justice Croke, wherein the Law was held to be otherwise; the Case was thus: viz. An Executrix brought a Writ of Rabiſhment of Ward, and Issue being joined upon the Tenure, it was found against her; three Judges held that she should not pay Costs; of whom the Reporter saith that Justice Hatton was one; but that Judge in his own Reports declares himself to be of another Opinion in the same Case, with whom Justice Yelverton agreed, that Costs should be paid; and their Reason was, because the Action was brought by the Executrix upon her own Possession, and for an Injury done to her self by taking away the Ward, whose Marriage did belong to her; so that this can be no Authority against the Payment of Costs in this Case. Cro. Car. 29.
Hutt. 78.

All the Cases which mention Costs not to be paid by an Executor or Administrator are where the Action is brought in the Right of another (viz.) upon Contracts, Obligations, or other Specialties or Things made to the Testator himself, and for which the Executor brings the Action; but where the Suit is founded upon their own Contracts, and a Verdict against them, or they suffer a Nonſuit, they must pay Costs. 2 Cro. 229,
361.
Cro Eliz.
503.

Econtra. The Judgment against this Executor is in autre droit, and therefore as it hath been said no Costs shall be paid; 'tis a Recovery de bonis Testatoris, and the Writ of Error now brought cannot be called an Action in his own Right; for 'tis to reverse that Judgment, and to have a Restitution to the Testator's Estate, not for his own Use, but for the Performance of the Will.

The Authorities cited on the other Side, are not applicable to this Matter; they only prove that Costs shall be paid by an Executor where he declares upon an immediate Tort done to himself, and found against him; but this Writ of Error is brought to have Relief in the Testator's own Cause.

Curia. By the Statute of 3 Jacobi 'tis enacted, that no Execution shall be ſaid by a Writ of Error, unless the Plaintiff in the said Writ give Bail to the Plaintiff in the Action in double the Sum recovered, to pay the Debt, and Damages and Costs, 3 Jac.
Cap. 8.

Sid. 183.

Costs if the Judgment should be affirmed; 'tis always held, that an Administrator who brings a Writ of Error, shall not give Bail, tho' he is not exempted by the Statute, neither shall he pay Costs in this Case.

Ellery versus Hicks & Uxor.

Assault and Battery was brought by Original against Husband and Wife; in the Writ there was but one Battery mentioned, and the Plaintiff declared upon two (viz.) one made on the first, and the other on the second of January, and that the Defendant set on his Dog to bite the Plaintiff.

The Husband pleaded, as to the setting on of the Dog, Not guilty; and as to the Batteries, son Assault demesne; and the Wife pleaded, that the Plaintiff and her Husband were quarrelling, and that in Order to part them, she manus imposuit, &c. ut bene licuit.

The Plaintiff replied *præcludi non, &c. quia die & Anno, &c. in narratione mentionat, &c. de injuria sua propria insultum fecerunt, &c.*

There was a Verdict for the Plaintiff at the Assizes in Cornwall, and now it was moved in Arrest of Judgment, and the Exceptions taken were,

(1.) The Action is brought by Original, in which there is but one Battery laid, and two in the Declaration, and so there is a plain Variance; but this Exception was disallowed because the Defendant shall not take Advantage of an ill Original without demanding Oyer of it, which he had not done; besides, 'tis only by Way of Recital in the Declaration, 'tis like *attachiatus fuit*, which is naught in an Action of Debt, but being only a Recital, it has been held good.

(2.) There are two Batteries laid in the Declaration on several Days, to which the Defendant pleaded son Assault, &c. and the Plaintiff hath replied but to one (viz.) *die & anno, &c. de injuria sua propria*. This Exception was also disallowed, because 'tis only a Discontinuance, and helped by the Verdict. It had been otherwise upon a Demurrer; so the Plaintiff had his Judgment.

Dighton *versus* Granvil.

A Judgment was obtained in the Reign of King James in an Action commenced in the Reign of King Charles the Second, and Debt was brought upon the Judgment in B. R. after a Writ of Error allowed, which Writ was (viz.) quia in Record & Processu ac etiam in redditione Judicii loquelæ quæ fuit in Curia nostra, &c. Now the Judgment and Continuances being in King James's Reign, and the Writ of Error supposing all to be done in tempore Regis nunc, an Objection was made, that the Record was not well removed, for it ought to be in redditione Judicii loquelæ quæ fuit in Curia nuper Domini Regis, because the loquela was begun in his Reign. 1 Show. 36.
2 Vent. 321.

But Serjeant Pemberton insisted, that this was amendable by the Statute of 8 H. 6. especially since the Word loquela might extend to the whole, and it was amended accordingly. 8 H. 6.
Cap. 12.

Then the Defendant pleaded a Writ of Error depending, and the Record certified into the Exchequer-Chamber; to which plea the Plaintiff demurred.

It was now argued for him, that this was no Plea, because Debt will lie in B. R. after a Writ of Error brought, and so it hath been adjudged; the Reason is, because by the Writ of Error the Transcript only, and not the Record it self is removed; for if the Judgment should be affirmed in the Exchequer, the Execution must be awarded in B. R. where the Record of the original Judgment remains. Sid. 236.

It has been an Opinion, that if Error is brought in B. R. upon a Judgment obtained in the Common Pleas, that pending the Writ Debt will not lie upon that Judgment in that Court, because the Record itself is removed, and so there can be no Foundation for an Action of Debt there, but the Reason is not the same in B. R. where the Record is not removed, but the Transcript only.

But even this Opinion is against the old Books (viz.) in 4 H. 6. a Writ of Annuity was brought, and the Plaintiff obtained a Judgment. The Defendant brought a Writ of Error in B. R. and pending that Writ the Plaintiff brought an Action of Debt upon the Judgment in the Common Pleas for a nomine pœnæ in not paying the Annuity upon a Day certain. The Defendant pleaded the Writ of Error depending, but a Respondeas ouster was awarded. 8 H. 6. 31. a.

So

18 E. 4.

So in Easter Term, 18 Ed. 4. an Action of Trespass was brought in the Common Pleas, and the Parties were at Issue whether the Plaintiff was the Defendant's Villain or not, and it was found for the Plaintiff; thereupon the Defendant brought a Writ of Error in B. R. and pending that Writ the Plaintiff in the original Action brought Debt in the Common Pleas upon the Judgment; and it was then objected, That such an Action would not lie, because there was no Record of any such Judgment before the Court, that being removed by the Writ of Error; but the Judges were of the contrary Opinion; for they held, That the Judgment tho' removed was in Force till reversed.

Curia. At the Common Law before the Statute of W. 2. if Execution had not been sued upon a Judgment in any personal Action within a Year and a Day, the Party must then have brought an Action of Debt upon that Judgment; for he could have no Scire fac. upon that Judgment, but now that Statute applies a proper Remedy by giving the Sci. fac. upon the Judgment after a Year and a Day; and it has been held, that a Writ of Error pending, was a good Plea in Abatement to such a Sci. fa. But of late days that has been over-ruled, tho' it has been said, that if there is a Judgment precedent to a Statute from the same Person who dies, and afterwards a Writ of Error is brought upon the Judgment, and pending that Writ, the Money due upon that Statute is paid, and there is enough remaining to satisfy the Judgment Creditor, that the first Payment to the Cognizor is good, because by the Writ of Error the Execution of the Judgment was suspended.

But in this Case the Demurrer was held good, and afterwards the Defendant was ruled to answer over.

Rex & Regina *versus* Waite.

A Motion was made to quash an Inquisition for a forcible Entry, the Exceptions were, viz.

(1.) 'Tis said, per sacramentum duodecim, &c. jurat. & impanellat', &c. and doth not say ad tunc & ibidem jurat', &c. for if the Time and Place are not sufficiently ascertained, the Inquisition cannot be good, because the fact may be committed above a Year past. And

Dyer 68; b. a Case in Dyer was cited for this purpose (viz.) in quinto Ed. 6.
one

one Buckler was indicted and outlawed for Murder in B. R. de eo quod such a Day and Year at such a Place he made an Assault upon B. Et ipsum cum quodam cultello, &c. felonice percussit occidit & murdravit, without saying adtunc & ibidem, and for this Reason the Indictment was adjudged to be ill.

But notwithstanding this Authority the Exception was not allowed in this Case, because 'tis not material here to shew the Place, &c. for the Party could not be amoved, so as to make the Defendant guilty of a forcible Entry from any other Place but from the Land,

(2.) Exception, viz. By the Statute of 8 H. 6. Restitution Cap. 9. is to be granted where the Tenant of the Freehold only is put out of Possession, and the Statute of 21 Jac. makes no Alterati- Cap. 15. on of any former Law, but only grants Restitution where a Termor for Years, &c. is put out of Possession: Now in this Case 'tis not said, that the Tenant of the Freehold was ousted, but that the Lessee for Years was ousted; and it was compared to a Case in B. R. Mich. 28 Eliz. viz. There was a Lessee for Years, and a Reversioner, and an Indictment was brought upon this Statute setting forth that the Defendant expulit & disseisivit him in Reversion, & quendam J. S. tenentem expulit, which last Word was applied to both, and two cannot be expelled where but one is in Possession; and therefore it should have been that the Tenant of the Freehold was disseized, and the Lessee for Years expelled, and for this Reason the Indictment was held to be naught, per Dolben & Eyre Justiciarios, ceteris absentibus.

Griffith *versus* Harrison.

There was a Covenant in an Assignment of a Lease that 1 Salk. 196. the Assignee should quietly enjoy, &c. free and clear of and from all Arrears of Rent.

An Action was brought upon this Covenant, and the Breach assigned was, That the Rent was arrear, and not paid.

The Defendant pleaded that he left so much Money in the Hands of the Plaintiff *ea intentione* to pay it over to the Lessor in discharge of what Rent was then arrear, &c. And upon a Demurrer to this Plea it was held good notwithstanding the Objection, That the Intention was put in Issue; for if it had been *ad solvendum*, it would have been good, and in this Case the Plaintiff might have replied, *non reliquit*, &c. *in manibus suis ad solvend'*, &c.

K k

Perry

Perry *versus* Odingsell.

INdebitatus Assumpsit for Payment of Money upon a Note,
and on a certain Day.

The Defendant pleaded in Bar that after the Day of Payment was incurred, he paid so much Money in Satisfaction of what was due upon the Note; and upon Demurrer this was held to be no good Plea, because after the Action is begun you cannot plead exoneravit; for Payment after the Day is good by way of Discharge, but not by way of Satisfaction.

D E

Term. Sanct. Hill.

Anno 5 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1693.

Benson *versus* Scott.

In an Ejectione firmæ for Copyhold Lands in Essex, upon not guilty pleaded, the Jury found a special Verdict, the Substance whereof was, viz. As to 4 Acres mentioned in the Declaration they find the Defendant not guilty, and as to the Residue they find that it was parcel of the Manor of Witherfield in the County of Essex, and held of the said Manor by Copy of Court-Roll, &c. 3 Lev. 385.
1 Salk. 189.

That before the Ejectment brought, viz. Octob. 3. 1690. Samuel Scott was seized to him and his Heirs by Copy of Court-Roll of the Lands in Question, and being so seized did the same Day surrender it into the Hands of the Lord of the Manor by the Hands of Edward Barker and John Pryor two Customary Tenants of the said Manor, to the Use of Barbara Callard and her Heirs, with a Condition to be sold upon Payment of 175 l. upon the 20th Day of August following.

They find that the Surrender was duly presented at the next Court in the Life-time of the said Samuel Scott, and that he did not pay the Money at the Day, or at any Time before or since, and that he died, and that Martha Scott the Defendant was his Widow.

They find that after the Death of the said Samuel Scott, the aforesaid Barbara Callard was admitted to these Lands,

K k 2

and

and surrendered the same to the Use of Richard Scott, the Lessee of the Plaintiff, who was Heir at Law to Samuel Scott, and that the said Richard Scott was admitted, &c.

They find the Custom of the Manor, That if any Copyholder die seized of Copyhold Lands having a Wife at the Time of his Death, that such Wife shall hold the said Lands during her Widowhood for her free Bench; then they find that the said Martha Scott was admitted to all the Copyhold Lands, of which her Husband died seized, to hold the same during her Widowhood, and that she is still a Widow; they find that the Lessor of the Plaintiff made a Lease to him, &c. and that the Defendant ejected him, and so made a general Conclusion, &c.

The Question upon this special Verdict Was, whether the Surrenderee, tho' admitted after the Death of Samuel Scott, the Surrenderoe, shall hold this Estate against the Widow who was thus entitled by the Custom of the Manor?

It was argued that he shall,

(1.) Upon the Construction of the Custom it self, which is that the Widow shall enjoy the Land in the same Manner as her Husband held it in his Life-time; but he might alien or extinguish his Right; if so, that which will determine his Estate, will likewise put an end to her Title.

(2.) From the Nature of Copyhold Estates; for Admittances to such Estates shall have Relation to all mean Acts; and therefore the Admission of the Surrenderee in this Case shall have Relation to the Surrender; but if no Admittance had been made, the very Acceptance of the Rent by the Lord after a Surrender is an Admittance in Law of him to whose Use the Surrender was made.

1 Roll. Abr.
505.
3 Bulst. 214.

Cro. Car.
568.

And to probe these two Points a Case was mentioned, which was adjudged in B. R. Hill. 15 Car. 1. viz. the Custom of a Manor was that the Wife of a Copyholder dying seized should have her Widow's Estate; it happened that in the 10th Year Car. 1. a Statute of Bankrupt was taken out against the Copyholder, and the Commissioners sold the Estate by a Deed of Bargain and Sale enrolled, Anno 12 Car. the Copyholder died, and his Widow was admitted before the Bargainee, who thereupon brought an Ejectment, and it was adjudged that by the Conveyance the Estate was vested in the Bargainee before Admittance; which proves that a Copyholder may extinguish his Right so as to bind the Estate of the Widow; in which Case it was also held, That

That after the Bargainee was admitted it had Relation to the Sale and should divest the Widow of that Right which she might have by the Custom.

If there are two Join-tenants of a Copyhold, and one surrenders out of Court to the Use of his Will, and deviseth his Moiety to a Stranger, and dieth, afterwards this Surrender is presented at the next Court, &c. the Devisee ought to be admitted, for by the Surrender and Presentment the Jointure was severed, for the Land was bound by the Surrender by way of Relation. 1 Inst 59. b.

The Heir and the Widow are both by Custom, and the Widow's Estate is no more than a Continuance of her Husband's.

Econtra. The Widow's Title commences from her Marriage, and shall not be defeated by any subsequent Act done by the Husband after the Coverture.

The Case of a Bankrupt Copyholder is not at all pertinent to this, for the Widow was divested of her Estate there, because her Husband did not die seized, the Estate being sold before his Death.

'Tis true, an Admittance doth refer to the Surrender, and likewise to all Acts between the Parties, but not to a third Person as the Widow is; it shall never relate to destroy a precedent Right, which is not consummate till the Death of her Husband.

If a Man marrieth, and afterwards makes a Bargain and Sale of his Land and dieth, then the Deed is enrolled, the Wife in such case shall be endowed.

Now nothing passes from the Surrendor till the Admittance of the Surrenderee: for till then neither the Lord himself, or the Person to whose Use the Surrender was made; but only the Surrendor continueth in Possession, so that the Plaintiff in this Case hath but an inceptive Title, and therefore shall not defeat the Widow. Cro. Eliz. 349
Yel. 16.

Curia. The Widow's Title doth not commence by the Marriage, if it did, then the Husband could do nothing in his Life-time to prejudice it; but 'tis plain he may alien or extinguish his Right, as in the Case of Bankruptcy before-mentioned.

The Free-Bench grows out of the Estate of the Husband; and 'tis his dying seized which gives the Widow a Title; and as the Husband had a defeasible Estate, so the Wife may have her Free-Bench defeated.

There

There is no Difference between this Case and that of Joint-tenants of a Copyhold; for as by a Surrender by one Joint-tenant, and a Presentment thereof, the Jointure is severed, and the Estate is bound by the Surrender by way of Relation; so in this Case the Admittance shall relate to the Surrender, and the Estate is thereby divested. Judgment for the Plaintiff absente Justice Gregory.

Coombs versus Talbott.

1 Salk. 21.

DEBT for Rent upon a Demise of a House and Lands at the yearly Rent of 9 l. per Annum, the Action was brought for two Years in arrear.

The Defendant pleaded as to the 9 l. part thereof nil debet, and as to the other 9 l. he confessed the Demise as laid in the Declaration, reddendo annuatim 9 l. for a Piece of Land called Chalwell, and 40 s. for other Lands, and 7 s. for another Parcel, &c. and quoad 40 s. Part thereof nil debet; and as to the rest, nil habuit in tenementis: And upon a Demurrer the Plea was held to be ill, because in Construction of Law, nil habuit in tenementis goes to the whole, tho' pleaded as to Part; and having likewise pleaded nil debet, that makes the Plea double; for upon nil debet the Defendant might give in Evidence nil habuit in tenementis; but by pleading he owed nothing, the Demise was admitted; and then by saying the Plaintiff had nothing in the Lands, &c. that made the Plea double and repugnant; but he should have traversed the whole Demise.

3 H. 6. 19.
21 H. 7. 21. b.
16 H. 7.
3 & 4.
12 H. 8. 11.
Cro. Eliz.
Collins ver-
sus Parding.

Johnson versus Oxenden.

5 Mod. 239.
167.

1 Mod. 167.
2 Roll. Rep.
59.

Prohibition was prayed to the Arches, to stay a Suit commenced there for Fees, against which it was said, That they are the proper and best Judges of their own Fees, which generally arise by Constitutions Provincial; and for this Reason a Prohibition was denied in the Common Pleas to a Proctor who libelled in the Spiritual Court for his Fees; and for the like Cause it was denied in B. R. in Hillary Term, 16 Jac. and the Reason then given was, That 'tis just a Proctor should be recompensed for his Trouble and Charge, tho' a Suit was commenced in a Court Christian for a Cause

Cause of which that Court had not an original Jurisdiction.

'Tis true, in Hillary Term 35 & 36 Car. 2. the Court of Exchequer made a Question in this Matter, but afterwards they refused to grant a Prohibition in the Case of Skelton and Lee; and since that Time the Court of Common Pleas in Hillary Term, 2 Wilhelmi & Mariae would not prohibit them in the Case of Frogget the Official of Wells and Josselin.

But on the other Side it was argued, That Courts of Common Law take Notice of Proctors Fees; and to prove this they cited * Dr. Lake's Case, who being a Commisary, was indicted for Extortion for taking 11 s. and 6 d. for absolving an excommunicated Person; and an Exception was taken to the Indictment because it did not set forth what Fee was justly due, and for this Reason it was quashed. ^{* 3 Leon. 268.}

Chancellors, Registers and Proctors are Officers of temporal Profit, whose Fees do not relate to the Jurisdiction of the Spiritual Court; there is a proper Remedy at Law to recover them, and therefore a Prohibition was prayed.

Curia. 'Tis Custom and not the Authority of Constitutions which entitles Proctors &c. to take Fees, for which an Action will lie at the Common Law, and therefore the Spiritual Court ought to be prohibited; the Rule was, That they should declare upon the Prohibition.

Goodright *versus* Cornish.

In a special Verdict in Ejectment the Case was thus, viz. John Knowling was seised in Fee of the Lands in Question, who had Issue two Sons, John and Richard. ^{1 Salk. 226.}

The Father devised the Lands to John his eldest Son for fifty Years, if he should so long live (which Term was to commence after the Death of the Testator) and after the Determination thereof, then to the Heirs Males of the Body of the said John; and for want of such Issue, then to his second Son in Tail, &c. Remainder to the right Heirs of the Devisor.

The Father died, John the eldest Son suffered a Common Recovery of these Lands, and declared the Uses to himself for Life, and to the Heirs Males of his Body; and for want of such Issue to the Defendant and his Heirs.

John

John died without Issue, and Richard died leaving Issue a Son of that Name.

The Question was, Whether John the eldest Son had an Estate-Tail by this Devise? If he had, then the Recovery was well suffered to dock that Estate, and it shall be a good Bar to the Remainders.

It was argued against the Estate-Tail, that the Nature of this Devise was by express Limitation for 50 Years, so that what the eldest Son had more, must be by Implication; for the Term was only designed for him; but where the Intent of the Devisor is apparent in the Will, no Construction shall be put upon his Words, so as to make any Estate to arise by Implication.

The legal Construction of these Words is to expound the Devise of the Inheritance to be an Executory Devise: It cannot be a Remainder, because a Freehold must depend, and be supported by a Freehold; but here the particular Estate being but a Term for Years, 'tis too weak to support a Remainder.

4 Leon. 21.

This was the Opinion of Dyer and Manwood in Mich. 29 Eliz. in the Common Pleas, that a Remainder in such Cases was void, because there is no Person who can take presently; but if the Lease had been made for Life with a Remainder to his right Heirs, then he would have a fee executed; so that in this Case John cannot have an Estate-Tail executed, because the Limitation to him by Way of Remainder was void in its Creation.

To prove that John took up an Executory Devise, they cited Mathew Manning's Case, which was thus, viz.

3 Rep. 94.

Edward Manning was possessed of a Term which he devised to his Wife for Life, paying every Year 7 l. to Mathew Manning, and after the Death of his Wife he devised it to Mathew, and made his Wife Executrix; He proved the Will, but had not Assets ultra the Term to pay the Debts of the Testator.

The Executrix assented to the Legacy, and paid it constantly to Mathew during her Life, she died Intestate, and Administration de bonis non of Edward was granted to Mathew, against whom a Creditor of Edward brought an Action, and upon plene Administravit pleaded, the Question was, Whether the Residue of the Term was Assets in the Hands of Mathew to pay the Debts of the Testator?

This Matter was found specially before the Lord Chief Justice Coke at Guildhall; and upon arguing of it in the Common Pleas, Justice Walmley was at first of Opinion, that the Devise to Mathew was void, because the whole

Term

Term was devised to the Executrix for Life, who might have survived the same; and there was only a Possibility that she might die within the Term and Matthew survive, which Possibility could not be limited by way of Remainder.

But it was adjudged, that it did best in Matthew not as a Remainder, but by way of Executory Devise, which, in Judgment of Law, shall precede the Disposition of the Term, till the Contingency shall happen; as if he had said (viz.) If my Wife die within the Term, then Matthew shall have the Residue, and farther had devised it to her for Life.

The same Point was adjudged three Years afterwards in the same Court in Lampett's Case, which was thus, viz. 10 Rep. 48.

John Morrice was possessed of a Term for 5000 Years in a House, &c. he devised the House &c. to his Father for Life, Remainder to Elizabeth his Sister, and to the Heirs of her Body, and made his Father Executor, and died.

The Sister married William Taylor, and then the Husband and Wife released to the first Devisee.

It was objected, That Elizabeth having only a Possibility to have this Term after the Death of the Executor, such Possibility could not by the Rules of Law be released to him in Possession.

But it was adjudged, that she had more than a Possibility because she took by Executory Devise, which vested an Interest immediately in Point of Law, tho' not to take Effect till the Contingency should happen; and therefore by this Release their Right was extinguished, and they had absolutely perfected the whole Term in the Executor, which before was determinable by his Death.

Now in the Case at Bar, if there had been a Limitation over to the right Heirs of John, the Remainder could never have vested in him, but his right Heirs would have taken by way of Purchase, because John their Ancestor had no freehold, but only a Lease for Years, but if he had a freehold for Life with a Remainder to his right Heirs, then the fee had vested in him, because then those Words, (viz. right Heirs) would be Words of Limitation of the Estate, and not of Purchase. Co. Lit. 319. b.

This is like a Covenant to stand seised for 20 Years, Remainder to the Heirs of the Body of the Covenantor, which is an executory Remainder, and to be barred by a Common Recovery.

Econtra. Such a Construction must be made of this Devise that the Will may have its Effect; and 'tis a known Rule in Law, that it shall not be construed by way of Executory Devise, if it will admit of any other Construction.

This is therefore a Remainder vested, or otherwise it must be void; 'tis an Estate-Tail in John of Necessity by Implication, because of these Words, viz. for Want of such Issue; and it makes no Difference whether those Words follow an Estate for Life or for Years, so as the Limitation is to the Heir.

9 Rep. 127.
Sunday's
Case.

A Devise to his Wife for Life, Remainder to William, and if he have Issue Male of his Body, then to such Issue, and if no Issue Male, then to Samuel, &c. so to Thomas, totidem verbis: It was adjudged, that every one of the Sons had an Estate-Tail, because of the Words viz. if no Issue Male, which are sufficient to create such an Estate, and yet there was no Freehold for Life devised to the Issue, but only a Devise generally,

1 Roll. Abr.
837.

The like Resolution was in Trinity Term, 7 Jac. in B. R. in a Case between Robinson and Miller, which was a Devise to the Wife for Life, Remainder to the Son of the Testator, and if the Son die without having a Son, Remainder over, the Son had an Estate-Tail by this Devise.

There is as much Reason that an Estate should arise by Implication here as in that known Case of Pybus and Mitford, and 'tis not material whether the Lease for Years is drowned by the Reversion in Fee descending upon John the eldest Son and Heir of the Devisor; for the Limitation being to the Heirs of the Body of John, and he being likewise Heir at Law to the Testator, so much of the old inheritable Estate shall arise to him by Implication, which may make him a Tenant for Life, and then he hath an Estate-Tail executed in him.

1 Mod. 124.
156.

A Man having two Sons by several Wives, did covenant to stand seised to the Use of his Heirs Males begotten on the Body of his second Wife (without any precedent Limitation of an Estate for Life) Remainder to his own right Heirs: It was adjudged that an Use did arise to the Son of the second Wife, because an Estate for Life did arise to the Covenantor by Implication, and this was by Operation of Law; for a Limitation to the Heirs of his Body, is in effect to himself, and then the Case is no more than a Limitation to himself for Life, and to the Heirs Males of his Body begotten on the Body of his second Wife; and this was the Case of Pybus and Mitford.

2 Mod. Dav.
vis versus
Speed.

So a Devise to S. from Michaelmas next for 5 Years, Remainder to A. and his Heirs; S dies before Michaelmas, this was adjudged a good Remainder in Contingency, because it being in the Case of a Will, the Freehold shall be in the Heir of the Devisor till the Contingency happens. Noy. 43.
Cro Eliz.
878.

So here this shall be a good Devise to the Heirs of the Body of John by way of contingent Remainder, and in the mean Time the Freehold shall not be in Abeyance, but shall descend to him being likewise Heir of the Devisor.

Agreeable to this is a very late Resolution of both the Courts of Law in Westminster-Hall, which was thus, viz. Palch. 4.
Willielmi.
Reeve ver-
sus Long.

John Long being seised in Fee, devised to Henry Long for Life, then to the first Son of Henry, and to the Heirs Males of the Body of such first Son, &c. and for Default of such Issue, to Richard Long for Life, with like Remainder in Tail-Male, Remainder over, &c.

The Devisor died, and Henry entered and died without Issue Male, but left his Wife with Child of a Son, then Richard entered, and afterwards the Son was born, who brought an Ejectment.

Those who argued for him, would have it to be an Executory Devise, and that the Freehold should best in Richard until the Son was born; but it was held to be a contingent Remainder, and there being no particular Estate in Henry to support it, therefore it was adjudged void; for otherwise, if it had been an Executory or a Springing Remainder (as it was called) in one, it would be so in all the Devisees, and that would be to introduce Perpetuities; so here to construe this to be an Executory Devise, would be to introduce the same Mischief, and to elude the Force of a Common Recovery, which is one of the chief Assurances of the Kingdom.

Curia. This cannot be an Executory Devise, if it should, then the Limitations over are void; it must therefore be a Contingent Remainder, and then 'tis void, because there is nothing but a Term for Years to support it: And afterwards in Easter Term Judgment was given for the Plaintiff.

Rex & Regina *versus* St. John's College in Oxon.

A Mandamus was prayed to the President of the College, &c. for that White who was the founder thereof, had appointed that there should be a President and fifty Scholars there, whereof three and forty should be named by particular Schools in London, and seven more by three Cities, of which Bristol was to name two; That one Baskerville being a Scholar of that College, had surrendered his Place, by Reason whereof that City had a Right to name another, that they named one King to succeed him, who was refused by the College, and that they had chosen a Person in his Stead, and therefore prayed a Mandamus.

Object. Such Writs have been granted in doubtful Cases, but not where a Visitor is appointed, which in this College is the Bishop of Winton, and he is to determine all Things concerning that Foundation.

But it was answered, That the Person who desired this Mandamus, was only a Nominee, and not yet of the Foundation, and therefore the Visitor had no Power over him till he came to be a Member of the College. The Court ordered the Statutes of the College to be returned; & adjournatur.

D E

Termino Pasch.

Anno 6 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1694.

Jones *versus* Morley Mil' Balnei & Bar'.

In Trespass and Ejectment for the Manor of Frensham in the County of Surrey, a Verdict was found, the Substance whereof was :

Cases in Par-
liament 140.
2 Salk. 677.

That Ann Bowyer was seised thereof in fee, and by Indentures of Lease and Release bearing date the 22d. and 23d. Day of January 1664. and made between Edward Morley, who was Brother to the Defendant, of the first Part, the said Ann Bowyer of the second part, and the Defendant Sir William Morley and John Wells, of the third Part, in Consideration of a Marriage then intended between the said Edward and Ann, and of a Settlement of Lands to be made by the said Edward in Jointure of the yearly Value of 300 l. He the said Ann did convey the said Manor to the Defendant Sir William Morley and John Wells and their Heirs, &c. in Trust for the said Ann and her Heirs until the said Marriage should take Effect, and until such Settlement in Jointure should be made; and from and after such Marriage and Settlement, then to the Use of the said Edward Morley and his Heirs.

That

That afterwards the said Marriage was had, and then by Indenture bearing Date about a Year after, viz. 29 Januarii, 17 Car. 2. Anno 1665. and made between Husband and Wife of the one Part, and Richard Young and John Trusser of the other Part, 'tis recited, That whereas a Fine is already acknowledged and agreed to be levied the next Hillary Term, by the said Edward and Ann, of the aforesaid Manor, it was declared that the Uses thereof should be and enure to the said Edward and his Heirs.

But before the said Fine was levied, viz. 31 Januarii, being two Days after the Date of the former Deed, there was another Deed made between the Husband of the one Part, and the Wife of the other Part, by which they did covenant and agree to make void all former Agreements, Contracts, Writings and Deeds whatsoever, until the Husband should fulfil the Covenants in the Marriage Settlement, of the 23d of January, and for Default thereof, that the said Ann and her Heirs should enter and hold the Premises.

The Fine was levied in the same Hillary Term, in which the Deed to lead the Uses thereof was dated, viz. 9 Februarii.

They find that 300 l. per Annum was not settled upon the said Ann in Jointure by Edward Morley; but only 250 per Annum, and that charged with an Annuity of 15 l. per Annum to another Person.

In July following, viz. Anno 1666. Edward Morley mortgaged the Premises to one Doble for 600 l. and the Year following he died without Issue, and Ann survived about 21 Years, and is since dead without Issue.

Sir William Morley the Defendant, as Brother and Heir at Law to Edward, entered after the Death of Ann, and discharged the Mortgage made to Doble, and now the Plaintiff Henry Billingham, as Cousin and Heir to Ann Bowyer brought the Ejectment.

The Questions upon this special Verdict were,

(1.) Whether by the Deed dated 29 January any Use was raised to Edward Morley, because it was dated in Hillary Term, and it declared the Uses of a Fine of next Hillary Term following, which must be a Year afterwards, and therefore that Fine levied in the same Term, in which that

that Deed was dated cannot be to the Uses in that very Deed; and for this the Case of Whetstone and Wentworth was cited, where 'twas held that if a Recovery be suffered Octab. Mich. and then an Indenture, dated 14 Novemb. next ensuing declares, That all Recoveries HEREAFTER to be suffered between the Parties shall be void, this Wd^d hereafter excludes all Recoveries suffered before, without averring the Intent of the Parties that it should be otherwise.

'Tis true, precedent Indentures shall direct the Uses of Recoveries, and other Conveyances made afterwards; but no Reason can be given why the Uses of the Fines and Recoveries should not likewise be guided by subsequent Deeds, and that they are so guided it was said, That Anno 6 H. 8. a Feme-sole suffered a Common Recovery, and being about to marry, declared the Uses thereof to be immediately after Marriage to her Husband and her self and their Heirs; afterwards they and the next Heir of the Wife by Indenture (taking Notice that she had no Issue) declare their Intent to be that notwithstanding the former Deed, the Heirs of the Body of the Woman should have the Land, and that therefore they would stand seised thereof to themselves in special Tail, Remainder to the right Heirs of the Feme: And it was adjudged that by this second Deed the Uses of the Recovery were changed.

2 Roll. Abr. 749.

2 Rep. 71. b. Ld. Cromwell's Case.

Dyer. 306.

(2.) The chief Question was, whether the Deed of 31 Januarii did not reboke and controul that of the 29th preceding, because it was made and executed before the Fine was levied: For 'tis not a Fine till engrossed, and then and not before the Uses are raised; but before that Time the Parties were come to a new Agreement; and therefore no Use could arise to Edward by the Deed of 29 Januarii; was a Rebocation of it.

1 And. 126.

And as to this Matter it was said that there was some Difference to be made where a Fine is levied, and the Uses thereof declared by a subsequent Deed varying in some Circumstances from the Fine, for in such Case the Party himself and his Heirs (tho not a Stranger) is bound and cannot aver it to be to any other Use than is declared in that Deed.

But where the Deed declaring the Uses of a Fine is Precedent, and then a Fine is levied varying from such Deed, there all Parties are at Liberty to aver against it, because the Fine stands singly by it self; and this is now the Case at Bar.

'Tis

'Tis a very immaterial Objection to say, that this Deed of 31 Januarii is void, because made only between Husband and Wife; for 'tis a Writing which will amount to a
 * 2 And. 58. * Deed-Poll, 'tis an Agreement shewing the Intent of the Parties: and 'tis therefore sufficient to declare the Use of a Fine, for an Use is a Creature of Equity, and therefore any Agreement between the Parties by which their Intentions do plainly appear has been held to be a good Appointment of an Use tho' * void to operate as a Deed, as a Bargain and Sale not enrolled pursuant to the Statute, or a Feoffment without Libery, so as 'tis made between the Parties, and of the same Lands.

* Moor 789,
512.

1 And. 240.
1 Leon. 210.
Cro. Eliz.
219.
Savil. 124.
2 Roll. Abr.
251.

And as such Agreements are sufficient to declare the Uses of a Fine, so a Parol-Agreement will be good to hinder the Raising of an Use where there is a manifest and plain Variance between the Deed and the Fine, as 'tis here; and therefore if this Deed of 31 Januarii, amounted to no more, 'tis not only a sufficient Declaration of the Uses of this Fine to the Wife and her Heirs, but it hinders any Use arising to the Husband, and the rather, because the Deed of 29 Januarii reciting the Fine did not declare any Uses to him; for there never was any such Fine levied as is therein recited (viz.) A Fine of the then next Hillary Term after the Date of the Deed; for the Fine levied was in the same Hillary Term wherein the Deed was dated.

Besides, that Deed of 29 Januarii was only directory, and the Uses therein declared were at all Times revocable till the Fine was levied; and therefore this intermediate Deed of 31 Januarii, being another Direction and Declaration of the Parties, and coming before the Fine was actually levied, is not only sufficient to revoke those former, but to declare new Uses to the Wife and her Heirs.

Econtra. It was argued for Sir William Morley, That this Fine and Deed of 29 Januarii made but one Conveyance, and that there was no Deed intervening declaring other or any Uses which did not consist with those declared by that Indenture.

That there must be a favourable Construction made of Deeds, according to the common and reasonable Intentions of the Parties, tho there may be some Room for a private Intendment; but no Man can think that these Persons did intend this Fine should be levied a Year after the Date of the Deed; 'tis neither agreeable to Reason or the usual Practice amongst Men, to have Fines levied so long after the Dates of Deeds.

Then as to the Matter it was said,

1. That this Deed and Fine made but one Conveyance, and that there was no Variance between them.
2. That the Uses were well directed by the Deed of 29 Januarii.
3. That they were not revoked or altered by the subsequent Deed of 31 January made between the Husband and Wife.

As to the first Point it was agreed, That the Fine was the superior Act which drew the Deed to it, they are both between the same Parties, and concern the same Lands, and therefore are but one Conveyance.

It was so adjudged in Wigson and Garret's Case, viz.

The Earl of Leicester by Deed dated 21 Eliz. covenanted to levy a fine, &c. to Trustees to the Use of himself for Life, and after his Death the Lands to be sold for Payment of his Debts, with a Power of Revocation by any Writing under Hand and Seal; a fine was levied accordingly.

1 Feb. 24 Eliz. he covenanted with other Trustees to levy another fine of the same Land to the Use of himself in Tail with others Remainders over, which fine was also levied.

The Question in that Case was, whether this latter Deed by which he covenanted to levy a fine to other Uses was a Revocation of the former?

It was argued, That the Deed alone could not do it, because in Operation of Law it was suspended till the fine was levied; and it was but an Executory Intention till that Time, because he might have altered his Mind, and not levied the fine pursuant to his Covenant: Besides, it was no express Revocation, and the Rule is that such Powers which go to divest an Estate must be strictly pursued.

Neither could the fine alone without the Deed be a good Execution of the Power, because it was not pursuant to the Deed of 21 Eliz. for he having reserved a Power to revoke by any Writing under his Hand and Seal, a fine cannot be called such a Writing, for 'tis a Record. But it was adjudged upon the whole Matter a good Revocation; for tho' these were several Instruments made at several Times, yet they were but as one Conveyance; and tho' 'tis not revoked by the fine it self, yet the Covenant

to levy that fine works a Rebocation, which Covenant is made perfect when the fine is actually levied.

So here, when this fine was levied, tho' at a different Time from that fine mentioned in the Deed of 29 Januarii; yet they both make but one Conveyance, and the one adds Strength to the other.

But there was a Judgment which comes nearer to the Case at Bar both in Reason and Consequence, and it was thus, viz.

1 Roll. Abr.
849.

One Parker by Deed dated 31 Octob. 8 Jacobi granted a Rent-charge in fee to Warden, in which Deed there was a Covenant to levy a fine to these Uses (viz.) That if the Rent should be in arrear at the Days limited in the Deed for the Payment thereof, and no Distress to be taken upon the Land; or if taken and replevied, that then the Grantee and his Heirs might enter, &c.

Warden by Bargain and Sale enrolled and dated 12 Junii 1 Jacobi conveys his Interest to Fisher, and afterwards half a Year's Rent was in arrear, viz. in Octob. 11 Jacobi.

In Trinity Term 12 Jacobi, a fine was levied to the Uses of the first Deed dated 31 Octobris, and Fisher distrained for Rent in September following.

Two Justices, viz. Coke and Montague held, That notwithstanding this Rent was in arrear before the fine levied, yet that being once done made but one Assurance, and the Uses thereof were well guided by the first Indenture: Their Reason was, That tho' these were distinct Acts, and done at several Times, yet in Construction of Law they shall be taken as one, because the first Deed was executory only till the fine was levied, and must then of Necessity have Relation to the original Cause.

'Tis true, Justice Houghton and Doderidge held, That no Uses were raised till the Fine was actually levied, which was not done till after the Rent was due, and therefore such Uses which were raised afterwards could not extend to the Rent arrear before that Time; but the other Opinion seems to be better warranted by the Books and Authorities in Law.

To apply it therefore to the present Case, viz. the first Deed dated the 29th of January was only executory till the fine was actually levied, it waited on and attended that Time, it was the first and only Cause why the fine was afterwards levied, which being once done must look back and have Respect to the original Cause.

Neither is there any Variance between these two Acts, for the Deed recites that a Fine is already acknowledged, which by common Intendment must be taken to be the Caption thereof before the Term in which the Deed is dated, otherwise 'tis not Sense to say afterwards, viz. and agreed to be levied the then next Hillary Term; for how can a Fine be said to be already acknowledged, and agreed to be levied a Year afterwards?

But supposing the Fine was to be levied a Year after the Date of the Deed, yet if 'tis levied before, 'tis still in Pursuance of the original Intention of the Parties, and being of the same Lands, it cannot with any Colour of Reason be intended to be different from what was at first designed by the Deed of 29 Januarii, and therefore no Parol-Averment ought to be admitted against it.

(2.) But Authorities are not wanting in the Books to prove that the Uses may be well directed by the first Deed of 29 Januarii, viz. Baron and Feme by Deed covenanted to le-
by a Fine of Lands to W. upon Condition that if they or
either of them paid 943 l. to W. at Lady-Day, 1611. that then
his Estate should cease, in which Deed the Husband did co-
venant that he and his Heirs should enjoy the Lands un-
der that Condition of Payment, &c. and after Default the
Rents to be received by W. and his Heirs, without In-
terruption, &c. Six Months afterwards there was a subse-
quent Deed made between the same Parties, and of the
same Lands under the same Condition of Payment as in
the first Deed, and the Husband did covenant that he and
his Wife would make a further Assurance by Fine to
W. and his Heirs, under the same Condition, until De-
fault of Payment, &c. and after Default, to the Use of W.
and his Heirs absolutely; which is different from the Uses
declared by the first Deed, for those were, That W. and his
Heirs should receive the Rent if Default should be in Payment,
&c.

In Easter Term following a Fine was levied by the Hus-
band and Wife to W. and his Heirs; and it was adjudged
that the Uses should be directed by the first Indenture.

*But it was
because the
Jury found
that the
Wife disa-
greed to the
last Deed.*

3. The Uses being well limited by the first Deed, were not
revoked or altered by the subsequent Deed of 31 Januarii, be-
cause it hath no Reference to any Fine levied; it limits no
Uses to any Person whatsoever; 'tis only a personal Agree-
ment and a Covenant between Husband and Wife, 'tis not
made between the same Parties, neither hath it any Rela-
tion to the former Deed.

M m 2

Now

Now if this intermediate Act between the first Deed and the Fine levied, should be a Revocation of the former Uses, no Man can be safe in lending Money, there would be an easie Way opened to baffle Creditors, and to defraud them of their just Debts, if the first Deed and Fine will not give them a Title.

But the Husband cannot covenant with the Wife, nor she with him, they are but as one Person in Law; and therefore as this latter Deed stands by it self, 'tis nothing, 'tis void both in Law and Reason, because there is but one Party to it.

'Tis true, if it had any Relation to a Fine, it might amount to a Declaration of its Uses, but there is neither Mention of any Fine or former Deed; therefore if it should be a Revocation, 'tis only quousq; the Husband settle a Jointure, &c. but it will not amount to that, because if it is a Covenant, 'tis void; for a Wife during Coverture cannot bind her Freehold but by Fine, where she is examined, and barred by Estoppel.

And 'tis for this Reason that the Countess of Rutland's Case cannot be applied to this, where it was held, that the last Indenture shall direct the Uses of a subsequent Fine, which was mostly thus (viz.) The Earl of Rutland by Deed dated the 10th of March did covenant with B. and G. to assure the Manor of E. to them before the End of the next Trinity Term by Fine, &c. to the Use of the said Earl and his Lady, and the Heirs of the Earl.

On the 28th Day of the same March he made another Deed to the said B. and G. by which he covenanted to convey the said Manor to them before Lady-day then next following, to the Use of the said Earl, and the Heirs Males of his Body, Remainder over, &c. By which last Deed the Earl did covenant with his said Trustees, That if he should not sufficiently convey, &c. before the said Lady-day, that then he and his Heirs would stand seized thereof to the Uses contained in the second Deed.

On the 17th of September following, and not before, the Fine was levied; and it was adjudged, that the Uses thereof were guided by the last Deed; but the Reason was, because it was a good Conveyance at Law, it being a Covenant to stand seized to such Uses; which differs from the Case at Bar, because the latter Deed was made between Husband and Wife only, and therefore void.

Here is no Alteration of the Minds of the Parties as to the Uses before declared, nor any express or implied Revocation; the latter Deed is no more than a Contract, and that was never yet allowed to make a Revocation; for suppose

pose the Husband and Wife had covenanted between themselves to sell the Land, it would not have been a Revocation of the Uses.

This Contract is as much void as any Agreement can be which is made by a feme covert, who cannot be bound by any Act, which she doth to her Prejudice; and for this Reason 'tis that she should not take Advantage of any Act which she can do for her own Benefit.

Since therefore this latter Deed of the 31 of January doth not refer to the fine, since 'tis only a personal Contract, and cannot therefore amount to a Revocation; and since 'tis void in Law, it being no legal Conveyance either to affect the Estate, or bind the Person of the Woman; therefore the Uses declared by the first Deed must stand unaltered and not reboked.

Curia. The second Deed is not only Evidence, but it actually changeth the Uses of the first Deed; for before the Statute of Frauds any Thing, even a Parol Declaration of the Uses of a fine, was good. Harr. 76. 2 Salk. 677

Now supposing this to be a Deed-poll, yet it will have the same Operation as a Deed indented, for they both work by way of Estoppel; and therefore in Hillary Term, nono Willi' Judgment was given for the Plaintiff, which was afterwards removed by Writ of Error into the House of Peers, and there the Judgment was affirmed.

Rex & Regina *versus* Larwood.

Information against the Defendant, setting forth, that the City of Norwich was an ancient City incorporated, whose Liberties were confirmed Anno 5 H. 4. which King made it a County, and gave the Inhabitants thereof Power to chuse two Sheriffs every Year. 1 Salk. 167

That on the 26th of January 15 Car. 2. the Charter granted to that City by H. 4. was confirmed, by which it was appointed, that one Sheriff thereof shall be chosen by the Mayor, Sheriffs and Aldermen, and the other by the Mayor and Commonalty of the said City, and that they shall be sworn every Year upon the 29th Day of September in the Guildhall of the said City before the Mayor and two or more Justices of the Peace.

That

That the Defendant on the 9th of July 4 Willi. was by the Mayor, Sheriffs and Aldermen, &c. duly chosen Sheriff of the said City juxta formam chartæ Car. 2. and they aver him to be a Person capable of the Office, and that he had due Notice that he was chosen, &c. and was required to take the Oath of a Sheriff on the 29th of September following, but that he refused so to do, and to take upon him the said Office of Sheriff, to the great Hinderance of the Business both of the King and his Subjects, &c.

The Defendant pleaded the Statute of 13 Car. 2. cap. 1. commonly called The Corporation Act, by which 'tis enacted (viz.) That no Person shall be elected or chosen into any Office of Trust in Cities, Corporations or Boroughs, who shall not within one Year next before such Election have taken the Sacrament of the Lord's Supper according to the Rites of the Church of England, and in Default thereof such Election is declared void.

Then he averred, that for several Years last past he was a Protestant Dissenter, and did not take the Sacrament within a Year before he was chosen Sheriff, &c. so that the Choice was void; and of this he gave the Mayor, &c. Notice.

He further sets forth, that on the 19th of July, primo Willi' & Maria he did take the Oaths appointed by the Statute of 1 Will. & Mary Entituled, An Act for removing and preventing all Disputes concerning the sitting of that Parliament, and subscribed the Declaration appointed by the Statute of 30 Car. 2. cap. 1. Entitled, An Act for disabling Papists to sit in either House of Parliament, &c.

They reply, That he as a Member of the Church of England, ought to have taken the Sacrament within a Year before the Election, and that he ought not to be excused from taking upon him the Office by his own Default, &c.

The Defendant rejoined, that he ought not as a Member of the Church of England to have taken the Sacrament every Year, according to the Rites of the Church, &c. for that by an Act made primo Will. & Maria for exempting Protestant Dissenters from the Church of England from the Penalties of certain Laws therein named, 'tis enacted, that no Law or Statute of this Realm made against Popish Recusants, excepting the Statutes of 25 Car. 2. and 30 Car. 2. for disabling Papists, &c. shall be construed to extend to Dissenters from the Church of England, who shall take the Oaths prescribed by the Statute of 1 Willi. & Maria cap. 1. and subscribe the Declaration enjoyned by 30 Car. 2. cap. 1. Which Oaths and Declaration the Justices of Peace in
their

their Quarter Sessions are obliged to tender to the Person : By which Statute of 1 W. & M. 'tis farther enacted, that such Persons who shall take the said Oaths, and subscribe the said Declaration, shall not be liable to any Penalties, &c. mentioned in the Statute of 35 Eliz. nor 22 Car. 2. entitled, An Act to prevent seditious Conventicles; nor should be prosecuted in any Court for Nonconformity to the Church of England, &c.

Then he averred, that he was a Protestant Dissenter on the 19th of July 1 Will. & Mary and that at the Quarter Sessions of the Peace then held at Norwich he took the said Oaths, and subscribed the Declaration, &c.

The Plaintiff demurred generally.

Pro Quer. The Intent of the Statute of 13 Car. 2. was not to keep Men out of the Church, but to incapacitate such who would not conform, that they might not hold any Office till they came in to the Church; for otherwise it would be to give a Man Opportunity by his wilful Default to avoid an Office of Burthen when 'tis coming upon him; and so it was adjudged in Sir John Read's Case, who was excommunicated for not paying Alimony, and because he would not take off the Excommunication when he was appointed Sheriff of the County, he was fined 1500 l.

'Tis true, this Statute saith, that if the Person elected shall not within a Year before his Election receive the Sacrament, that it shall be void; but as to that, the Statute must have a reasonable Exposition (viz.) it shall be void to claim any Benefit to the Office to which he is elected, but not so void that he shall not be punished for not qualifying of himself; 'tis like the Cases of Bishops, Deans and Chapters, whose Leases, if not pursuant to the Statute, will be adjudged void; but it hath often been ruled, that they are not void to all Intents, but only to the Lessors themselves, and against their Successors; for * Statutes must have a reasonable Construction.

* Plowd.
110. b.
8 Rep. 118 a.

Every Man is enjoined by the Ecclesiastical Law to take the Sacrament once in a Year, and that is part of the Law of the Land: But to excuse himself, the Defendant saith, that there is another Law made primo W. & M. to exempt Persons from being punished for Nonconformity, which is a very unnecessary Excuse, because a Punishment is not now intended for any Thing exempted by the Statute, but for an Offence at the Common Law in not qualifying himself to

to take the Office of a Sheriff for the Service of the Government, and which by Law he ought to take upon him.

Then as to the Pleading, this Rejoinder is a Departure from the Bar; for he hath pleaded the Statute of 13 Car. 2. which (as he alledgeth) made his Election void by not receiving the Sacrament within a Year; and in his Rejoinder he excuseth himself from taking the Office by pleading another Statute (viz.) that he ought not to take the Sacrament according to the Rites of the Church, &c. as a Member thereof, &c. which is not pursuant to the same Thing.

Rotheram Serjeant conira. If the Election is made by the Statute of 13 Car. 2. then the Defendant was never lawfully chosen Sheriff, and so cannot be punished; and it would be very inconvenient if he should be compelled to act without a legal Election, because he would be incapable of executing any Process.

The Statute intended only to disable Men who were not of the Communion of the Church of England to hold publick Offices, and not to punish them if they did not qualify themselves; it was made in favour of the Church, and not to inflict Punishments upon Dissenters for Nonconformity; for they being excluded (unless they would qualify themselves) the Profits of all the great and beneficial Places throughout the Kingdom, must of Consequence be enjoyed by Churchmen.

14 Car. 2.
cap. 4.
17 Car. 2.
cap. 2.

That this was the Intent and Design of that Law, will more plainly appear by comparing the Bartholomew and Oxford's Acts together; the one enjoins that every Parson, &c. shall within a Time limited declare his Assent to the Book of Common Prayer, or that his Living shall be ipso facto void. The other enacts, That if they have not declared their Assent as aforesaid, and shall take upon them to preach, that then they shall not come within five Miles of a Corporation, or the Parish where he was Parson, upon Penalty of 40 l. which shews that the first Act makes the Living only void, but the other inflicts the Punishment; therefore the Defendant cannot be punished in this Case, because the Statute of 30 Car. makes the Election void, but adds no Punishment to the Person unqualified.

As to the Objection, that the Incapacity arises from the Default of the Defendant himself, that cannot be material; for if he removes from the Corporation, he shall not be punished for not executing the Office, and yet he is thereby made incapable by his own Act.

The Neglect in not receiving the Sacrament is not an Offence at the Common Law, or against any Statute; 'tis made so by the Canons which enjoin the receiving of it three Times in a Year: so that it doth not fall within the Cognizance of the Temporal Courts to punish the Defendant, but by that Law against which the Offence was committed.

But if B. R. should take Notice of it, he ought not to be made a Criminal upon a bare Presumption, for he may be hindered from receiving of it by an Incapacity of Mind, by Sickness, or otherwise.

Neither can Sir John Read's Case be any Authority against the now Defendant, because he was lawfully appointed to be Sheriff, and his Incapacity incurred *ex post facto*, which is different from this Case.

But if the Neglect to receive the Sacrament was an Offence before the Statute of 1 Will. & Maria, yet 'tis not punishable now; for by that Statute Protestant Dissenters are exempted from the Punishment inflicted on them as such by any former Laws; and tho' they dissent from the lawful and established Church, yet if they are Protestants, and have taken the Oaths and subscribed the Declaration, they are not to be punished for Nonconformity; and the Defendant hath averred himself in his Plea to be qualified in these Points, and so not to be prosecuted for Nonconformity.

Judicium. Afterwards in Hillary Term 6 & 7 W. & M. Judgment was given for the Plaintiff (*viz.*) That the Corporation Act never designed to exempt Dissenters from bearing Offices in the Government, but to establish a Succession of Persons who were well affected to it, for otherwise it would be an Encouragement for some Men to persist in their Nonconformity on Purpose to avoid Offices of Burthen and Charge, instead of bringing them to conform, which was chiefly intended by that Statute.

'Tis a Fault in the Defendant not to have received the Sacrament at least once in a Year, because by the Canon Law which hath been received here Time out of Mind, he is obliged so to do; and therefore 'tis very absurd to alledge as an Excuse, what is really a Neglect of his Duty.

If he had been disabled by a Judgment in Law, he might have been excused; for tho' his Fault or Neglect was the Occasion of such Judgment, yet 'tis a Mark set upon him by the Government.

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But in Case of an Excommunication where he may remove the Disability, there he shall not be excused.

Then as to the Pleading he doth not say, that he could not receive the Sacrament, &c. for the Sake of his Conscience. Supposing then a Man before the Act of Indulgence of 1 W. & M. had neglected or omitted to receive the same within a Year before his Election to an Office, no Man will say, that it should have excused him.

The Defendant therefore should at first have pleaded in Bar, That he was a Dissenter from the Church, &c. and then brought himself within the Compass of the Act of Indulgence, of which the Court cannot take any Notice, because 'tis a private Act; for before it was made, the Law did not take any Notice of Protestant Dissenters, but only of Dissenters from the Church in general; besides, 'tis an Act which doth not extend to all Sorts of Protestant Dissenters, but only to such who shall qualifie themselves as therein is prescribed.

If therefore the Act of Indulgence is a private Law, then the Corporation-Act will not be a sufficient Excuse for the Defendant to be exempted from this Office, because the Act never intended to excuse him who was liable before; it was not made in favour of Dissenters, it intended to make Persons qualifie themselves the better to serve the Government in establishing faithful Officers therein, and ever since the Making of that Law, when a Freeman who was a Dissenter, was chosen an Alderman of a Corporation, he never insisted upon the Act as an Excuse, but submitted to a fine, and so must the Defendant.

But one Judge, (and the Lord Keeper, as it was said at Bar) being of a contrary Opinion (viz.) That the Defendant was sufficiently punished by the Corporation-Act, in being disabled to hold any Office or Employment of Profit; and now to punish him by an Information, would be a double Punishment for one Offence, which the Law will not allow: therefore there being a Capias against the Defendant pro fine, and he now appearing in Court, he was fined five Marks, and no more.

Rex & Regina *versus* Kemp.*Mich. 5 Willielmi, &c. Rot. 333.*

Scire fac. out of the Petty-Bag to repeal Letters Patents, ^{2 Salk. 464.} &c. setting forth, That King Charles the Second did on the 25th of July, Anno 12 of his Reign, grant to Martin the Office of Searcher in the Port of Plimouth, quam diu Domino Regi placuerit.

That on the 14th of January, Anno 25 of his Reig^r, the King by Letters Patents reciting the Grant to Martin, &c. did grant this Office to William Fryer for Life, habendum cum post mortem, sursumredemptionem vel forisfacturam of the said Martin, it should be void, with a non obstante to the Statute of 14 R. 2. c. 10.

William Fryer on the 24th of December, Anno 27 Car. surrendered his Interest to the King, who in Consideration thereof the same Day did grant this Office to Henry Kemp for Life, to commence upon the Death, Surrender, forfeiture, or other sooner Determination whatsoever of the Estate of Martin, and in the same Letters Patents grants it to William Kemp for Life, upon the Death, Surrender, or forfeiture of Henry Kemp and Martin.

Henry Kemp died, Martin still surviving, then the King died, so that Martin's Patent was void; for he having only an Estate at Will insisted that it was not only determined by the Grant made to Fryer, but by the Demise of the King, and William Kemp being possessed of the Office by Virtue of the last Grant, a Scire fac. was brought to repeal it, to which he demurred.

The Questions were,

(1.) Whether the Grant made to William Fryer was good or not; for if that fails, then the Grant to Kemp is void?

(2.) Whether the King can grant an Office to commence in futuro?

(1.) The Grant to William Fryer is void, because the Estate of Martin being only during Pleasure, it was too weak to support a Grant of this Office in Reversion, which was likewise to com-

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mence upon such an Incertainty as the Determination of the King's Will.

Besides, the King was mistaken in his Grant both in Point of Law and in Fact.

First in Point of Fact, because he intended to grant an Estate in Reversion to Fryer: now Martin having an Estate at Will, and if that Will be determined by the Grant it self to Fryer, then the King had the Office in Possession, and Fryer must have it so, which was never intended.

² Brownl.
241.

'Tis plain that the King thought that Martin had a more durable Estate when he made the Grant to Fryer, for Martin's Patent is recited in Fryer's Grant, which Patent was then actually determined; now where an Office or an Interest in an Office is recited to be in being when in truth it is not so at the Time of the Grant, 'tis enough to make that Grant void.

Dyer 197. b.

King H. 7. Anno 9. of his Reign, by Letters Patents made Robert Blague Remembrancer of the Exchequer for Life, who Anno 3 H. 8. was made one of the Barons of the Exchequer quam diu se bene gesserit, he still executed his first Office by Deputy, and afterwards, viz. 7 H. 8. he got Leave of the King to grant it to his Son for Life, when it should be void by his Death or Surrender, or by any other means whatsoever, but because he had no Right to the Office after he was Baron, therefore it was held that the Grant to the Son was void, and a Scire fac. being brought by the King it was repealed.

'Tis observable that the King doth not say ex certa scientia & mero motu damus, &c. Now suppose he had died before Martin, as in fact he did, that would certainly have determined his Interest, but yet the Patent saith that Fryer's Interest shall not commence, but upon the Death, Surrender, or Forfeiture of Martin.

³ Leon. 5.
1 And. 6.

Sir Thomas Moor being possessed of a Term for 44 Years was attainted of Treason, the King seized it, and made a Grant thereof to Phillips, Habendum for 21 Years after the End of the Term made to Sir Thomas; now this Lease to Phillips was adjudged void, because the first Lease for 44 Years being forfeited by Attainder was extinguished in the King long before that Lease was made; so that the Estate and Interest to Phillips was not well limited in the Commencement, which seems to come near the Case at Bar, for by the Grant to Fryer his Interest was to commence upon the Death, &c. of Martin, when it actually commenced in Possession, because Martin had only an Estate at Will which was determined by that very Grant made to Fryer.

2. The King was mistaken in the Law, for by the Premises in his Grant his Will (as to Martin's Interest) being determined, then the Habendum to Fryer after the Death of Martin can have no Operation, because its Office is to limit, and not to revive or extinguish.

And the non-obstante to the Statute of R. 2. will not help, because the Grant to Fryer is void; 'tis true the first Grant is recited in the second, for otherwise it had been clearly void by the express Words of the Statute of 6 H. 8. cap. 15. which Law was made on Purpose that the King might not be deceived in his Grants; but this Recital of the first Grant must be intended at the Suggestion of the Party, and he having falsely informed the King, viz. that the Grant to Martin was in being when the King had determined his Will, that false Information being the Consideration upon which the second Letters Patents were grounded shall avoid the Grant. Dyer 237.
339.

If therefore the Grant to Fryer was void in its Creation, then his Surrender to the King must be likewise void, and if any Thing passed by the second Grant to Kemp, it must be an Estate in Possession, and must vest presently which was never intended; it cannot be an Estate for Life in him to vest in futuro, for the Law will not allow any fractions of an Estate for Life.

And to prove that at the Time of the second Grant the King had the Office in Possession, the Case of one Philpot was cited, which was mentioned by the Chief Justice Fleming, Anno 2 Eliz. in his Argument in my Ld. Rutland's Case, viz. The King made a Lease for Years, and afterwards reciting that Lease, he granted the Reversion to another; but before the Letters Patents were sealed, the Lessee surrendered the Term, it was held, That by this means the Grant of the Reversion was void, because the King intended to pass a Reversion who had the Possession himself at the Time of the Grant; so that when his Grants cannot have the Operation which is intended by him, they must be void. 2 Brown.
241.

Econtra. Nothing has been said why the Grant to Fryer should be void, but that by the Making of the Patent to him the King had determined his Will as to Martin, so that at that Time he had an Estate in Possession, which he granted as a Reversion, and therefore his Grant was void; but it appears to be otherwise upon reading of the Letters Patents, for the King has therein recited the Estate at Will to Martin, which shews that he did not intend to determine it. It

6 Rep. 55. b.
Cro. Car.
197.

It has been objected, That Fryer's Patent is void, because the Limitation of his Interest is different from what was intended by the King, for it was to commence upon the Death, Forfeiture, or Surrender of Martin; Now tho' in fact it did not commence by either of these means, but by the Death of the King, yet this cannot be an Objection of any Weight, because these Words were only to shew when his Title shall begin, and if the King is mistaken in that Matter 'tis not to his Prejudice; and therefore his Grant cannot be void for this wrong Commencement, or for the Uncertainty when it should commence.

6 Rep. 35.

'Tis true, it might have been made much better, but still 'tis a good Grant, and that within the Reason of the Bishop of Bath's Case, which was thus, viz. he made a Lease to Eliz. and Robert Cosin for 60 Years, in which there was a Proviso, That if they die within the Term, the Bishop and his Successors might re-enter: Robert surbided Elizabeth, then the Bishop died, and in 18 H. 8. another was consecrated, who made a Lease of the same Land to Clark for 60 Years, when it should be void after the Death, Forfeiture, or Surrender of R. Cosin, who died within the Term first granted.

It was objected in that Case that the Commencement of the second Lease was uncertain, for it must be upon one of those three Accidents, and therefore it was void, because uncertain upon which of those Contingencies it should commence; for if it did not begin upon Forfeiture or Surrender, it could never begin in Possession upon the Death of R. Cosin, because the first Lease was not void upon his Death; for it was voidable by Re-entry of the Bishop: but it was adjudged that the second Lease did best in Point of Interest immediately, and should not wait to take Effect in Possession at the End of the Term first demise, if that Lease should not happen to determine by either of those three Accidents; so that its Commencement in Interest was certain enough.

36 a.

In which Case it was also agreed, That if it be doubtful whether the King hath a Title to grant or not, by Reason of a former Lease in being, which may be either good or not, and the second Lessee accepts a Lease of the same Lands, habendum after the End or Determination of the former Lease, and if that Lease should not happen to be good, then from such a Feast for so many Years, &c. Now tho' the Commencement of such a Lease as this seems to be very uncertain, yet 'tis good in the Case of the King, because the first Lease must be void or not; if void, then the second Lease

Lease commences from the Feast, &c. if good, then from the Determination of the first Lease.

A Grant of a Stewardship of several Manors by Name without mentioning in what County, is very incertain, because the King may have divers Manors of the same Name in several Counties, and no Issue can be taken which Manors the King intended to grant; but yet such a Patent has been held good. 9 Rep. 42.

So a Grant to the Earl of Rutland a tempore plenæ ætatis, when in Truth he was of Age long before, yet it was adjudged a good Patent, because it was the Intent of the King that it should commence from that Time; and if that could not be, then for the Time to come. But the most material Question was not debated by those who argued on the other Side, viz.

Whether an Estate for Life in an Office may be granted in futuro to commence after the Determination of an Estate at Will: for if this can be done, tho' 'tis a Grant in Reversion, yet there needs no precedent Estate to support it.

As to this Matter the King hath a general Power to grant Offices in Reversion; it hath been a doubtful Point whether a ministerial Office could be so granted in the Case of a common Person, but it was never questioned but the King might do it, who hath a special Privilege for that very Purpose, and therefore Anno 15 Eliz. it was the Opinion of my Lord Dyer who was a learned Judge, that a Bishop could not grant the Office of a Register in Reversion without prescribing so to do, because in Propriety of Speech there is no Reversion of this Office, 'tis only a Nomination of the Person who shall succeed the Officer in Possession, but the King may grant it after the Life of the Person in being, tho' not by way of Reversion, but only reciting that such a one hath an Estate for Life, nos de gratia speciali, &c. concessimus officium, &c. to the Grantee, habendum post mortem, &c.

9 Ed. 4. 6,
3 H. 7. the
last Case.
Bro. tit. Patent pl. 52.
3 Leon. 31.
Dyer 80. b.
259. a.
Hob. 150.
151.
Cro. Car.
279.
2 Roll. Abr.
154.

But as to this Matter the Law is now altered (viz.) That a Bishop may grant the Office of Register in Reversion without reciting the Estate of the first Grantee; and if so, certainly the King may grant this Office in futuro; and the rather, because in its very Nature he hath only a Right of Nomination, and the Grantee himself hath little more in it than a bare Authority without an Interest; he hath only a Power to search for prohibited Goods either imported or exported at Plymouth; and it was never yet denied, but an Authority (as this is) might be granted in futuro.

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'Tis no Objection to say, that a Freehold in Lands, &c. cannot be thus granted: 'Tis true, the Law is so in the Case of a Freehold of Lands which are always in being, for otherwise it would be in Abeyance, which is not allowed, but in particular Cases, and it would be to make Fractions of Estates, neither could Libery of Seisin be had in such Cases; but none of these Reasons concern an Office which hath no Existence but at the Pleasure of the Grantor, and is no longer in being then whilst it continueth in Grant.

But the Wisdom of the Law hath made a Difference, eben in Offices themselves (viz.) between such as are in Fee existing, and such as are only granted for Life or at Will; and then Offices in Fee will fall under the same Rules with other Inheritances, but Offices for Life may be granted in futuro by the same Reason as a Rent or a Common may be granted to a Man and his Heirs; and therefore in this Grant the King was neither mistaken in Fact or Law; for this Office may be granted in futuro after the Determination of an Estate at Will, which is not to support the subsequent Grant, but the Recital of it is only to shew when that shall take Place.

Curia. The King may grant an Estate in an Office to commence in futuro, or upon a Contingency, which Estate shall arise out of the Inheritance he hath in the Office itself, for such he may have in point of Interest, tho' not in Execution.

Now admitting that the Estate at Will which Martin had was determined, yet the Grant to Fryer shall be good, and by Consequence after his Surrender the Grant to Kemp shall be also good; for there was such an Office as this of Searcher, &c. tho no Estate in the Office was in being when the Grant was made to Fryer; and if so, then by that Grant a new Thing was created to commence in futuro after the Death, &c. of Martin; and since Corbet's Case it hath not been doubted but a Rent de novo may be granted to commence in futuro, for 'tis a Creature of the Grantor; and this being in the King's Case, he may constitute his Grant in what Manner he thinks fit.

There have been many such Grants of late Years, and it will be very hard to assign a Reason why a Grant to commence in futuro should not be as good where there is no such Estate or Interest in an Office in being.

This is not a Remainder or Reversion; 'tis not the one, because not created when the particular Estate was granted,

nor the other, because there is no Inheritance in this Office, but still 'tis a good Grant by way of Reversion (viz.) habendum after the Death of the first Grantee, &c. and such Grants have been held good in Law; wherefore in Trinity Term following Judgment was given for the Defendant.

Knipe *versus* Edwin,

A Mandamus to the Dean and Chapter of Westminster to admit the Defendant to the Office of Bailiff there, upon the Nomination of the Duke of Ormond who is High Steward, and it was insisted, That he could not have an Assize, because he had neither any Seisin or Freehold before Admittance.

Econtra. 'Tis the Dean and Chapter, and not the High Steward, who usually appoints a Person to this Office; for of common Right they who have a Franchise or Retorn Brevium, have also Power to put in a Bailiff, which the Dean and Chapter hath in this case, and accordingly they have always granted this Office; and when the Person is in, he is styled Ballivus Decani & Capituli, &c. and 'tis they who are to answer for his Miscarriages.

A Mandamus is a Prerogative Writ, and usually granted where the publick Justice of the Nation is concerned; but here is a Dispute between two Persons about the Right of Nomination to this Office, and Knipe is admitted by the Dean and Chapter, and sworn into it, so that he hath a Freehold for Life; and this Writ was never yet granted to try Titles; if Edwin hath any Prejudice, he may bring an Action on the Case, as a Clerk may against an Archdeacon who refuses to admit him, but cannot have a Mandamus.

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Curia. An Action on the Case will not put the Man in Possession of the Office, for by that he shall only recover Damages: A Mandamus was granted, but without Prejudice.

Reeve *versus* Long.

3 Lev. 408.
1 Salk. 227.

EXECUTOR of a Judgment in the Common Pleas in Ejectment for Lands in Milkham in the County of Wilts, in which there was a special Verdict found to this Effect (viz.) That John Long Esq; was seized of the Lands, &c. in Fee, who by his last Will dated the 20th of July 1676. did devise the same to his Nephew Henry Long (the eldest Son of his Brother Richard Long) for life, and after his Decease to the first Son of the said Henry Long lawfully begotten, and the Heirs Males of the Body of such first Son lawfully issuing, and for Default of such Issue, to the second, third, fourth, fifth, &c. and every other Son of the Body of the said Henry Long lawfully to be begotten, successively one after another, and to the Heirs Males of their respective Bodies; and for Default of such Issue to Richard Long the Defendant, second Son of Richard Long, for Life, and after his Decease, to his first, second, third, &c. and every other Son, ut supra, with divers Remainders over.

John Long died, and Henry entered, who had Issue one Daughter, and about Lady-day 1687. died leaving his Wife enfeint with a Son, who was born about six Months after the Death of his father. But upon the Death of Henry without Issue-male, Richard Long being the next in Remainder, entered, &c. and afterwards the posthumous Son by his Guardian entered upon him, and thereupon Richard brought this Ejectment, and had Judgment in the Common Pleas, which Judgment was said to be erroneous.

'Tis plain that Henry the after-born Son is Heir at Law, and if this Will had not been made, he would have inherited; and therefore the Intention of the Testator must be very clear in the Will it self to disinherit this Heir, otherwise he must not be defeated of the Estate.

But his Intention (which is the only considerable Thing in the Will) appears to be of another Nature; for throughout every Paragraph 'tis plainly to be collected, that he intended his Land should go, and be continued in the Heirs males of his family successively.

This must therefore be an Executory Devise, and not a contingent Remainder; and the rather because 'tis in the Case of a Will by which Estates do pass otherwise than by Conveyances

at

at the Common Law; and the Law will not suffer this to be construed a contingent Remainder, because that would be to disinherit an Heir upon a Nicety against the plain Intention of the Testator.

That Intentions govern in Wills many Authorities may be cited (viz.) If the Father, having three Sons devises his Land to his Eldest Son in Tail, Remainder to his second Son in like manner, Remainder to his third Son in Fee, and the Eldest Son happens to die in the Lifetime of his Father leaving Issue, it has been held that such Issue shall inherit without a * new Publication of the Will, because it was not the Intention of the Father to disinherit him.

Cro. Eliz.
424.

* But if the Devise had been to a Stranger, the Will must be new published.

If therefore this is a springing Remainder, then the Freehold shall best in Richard till the Son of Henry was born, and then it shall best in him; and to prove it to be a springing Remainder of Executory Devise, that noted Case of Pell and Brown was cited, which is reported in several Books (viz.) the Father being seised in Fee, and having Issue three Sons, William, Thomas and Richard, devised it to Thomas and his Heirs, paying Richard 20 l. per Annum, &c. and if Thomas died without Issue, living William, then to him in Fee.

2 Cro. 590.
1 Roll. Atr. 611.
2 Roll. Rep. 394.
Palm. 121.
Bridgm. 1.

Thomas entred and suffered a Common Recovery to the Use of himself and his Heirs, and devised it to A. and died without Issue in the Lifetime of his Brother William, to whom the Land was adjudged; for Thomas had no Estate-tail, but a limited Fee which was determined by his dying without Issue, living William, whose Interest must arise upon a Contingency (viz.) by way of Executory Devise; for Thomas might have survived him, or might leave Issue living William; and therefore this Recovery could be no Bar, because the Estate of William did not depend upon that of Thomas, but was collateral to it, and a meer Possibility which a Recovery could not affect, and which it would have done if it had been a Remainder vested; ever since this Case Executory Devises have been allowed not absolutely upon a dying without Issue, but dying so in a particular Time, for otherwise Estates might be continued to Perpetuity which the Policy of the Law will not endure.

To prove likewise that Freehold shall best in the Heir till the Contingency happens, a Judgment was cited in B. R. 43 Eliz. viz. A Man devised his Lands to M. for a Term of years, which was to commence at the next Michaelmas after the Death of the Testator, Remainder to N. and his Heirs.

Cro. Eliz.
879.
Noy 43.

the Question was, Whether this was a good Remainder? 'Tis plain it could not take place eo instante that the particular Estate determined, because of the Term for Years coming between these Estates; but it being in the Case of a Devise, the Freehold in the mean Time shall descend to the Heir of the Devisor.

Econtra. This is a contingent Remainder, for if it should be an Executory Devise, then a Perpetuity would be introduced, because if 'tis executory in one, it may be so in all the Devisees; and therefore it would be against the known Principles of Law to make it an Executory Devise, especially in this Case where the Testator was not sure that Henry Long would have a Son; so that 'tis a plain Contingency, which not happening in time, nothing remains in him to make it executory.

There are two Things to make a Devise executory, (viz.) it must be limited upon an Estate in Fee-simple, and it ought to be limited upon a Condition, both which are wanting in this Case; neither can any Remainder be executory where there is a particular Estate to support it.

²Saund. 380.

As for Instance, A Devise was to his Wife for Life, and to a Son after the Death of his Mother, if he should have a Son; and if he die before he come to Age, then to the right Heirs of the Devisor, which Devisor died without Issue, his Wife married again; then the Heir of the Devisor by Bargain and Sale enrolled, &c. conveyed the Reversion to the Husband and Wife, who had afterwards a Son born: Now it was adjudged, that the Estate limited to that Son shall not enure by way of Executory Devise, because that is never allowed where a Contingency is limited to depend upon a Freehold capable to support it; for the Mother had a Freehold for Life, and therefore it was adjudged a contingent Remainder to the Son; and the Heir at Law having a Reversion in Fee in him by Descent, it was held, that the Remainder was destroyed by his conveying that Reversion to the particular Estate for Life in the Mother before her Son was born.

¹Rep. 66.

But Archer's Case was relied on as an Authority in Point (viz.) A Devise to the Father for Life, Remainder to his next Heir-male in Tail-male; the Devisor died, the Father made a Feoffment with Warranty; adjudged that by this means the Remainder was destroyed, because every contingent Remainder must take place eo instante that the particular Estate determines, or vests during the particular Estate;

I

now

now it could not take place eo instante the particular Estate determined, for that being gone by the feoffment, the Son could not be Heir to his Father who was then alive; for nemo est hæres viventis, and therefore could not enter for a forfeiture, neither could it vest during the particular Estate, because that was actually forfeited.

So here in the Case at Bar, the Estate being limited to Henry Long for Life, Remainder to his first Son, and Henry dying before that Son was born, the Remainder could not vest in him who was not then in being; and the particular Estate being determined by the Death of Henry, it must go over to the Defendant who was next in Remainder.

As to the Case of Pell and Brown, the great labour there was to make it an Estate-tail in the first Devisee, which not being allowed, then it must be a void Limitation to the next, unless construed to be an Executory Devise to him; and that was the Reason of that Judgment on purpose that the Intent of the Testator might be fulfilled; but that differs from this Case, because the Person to whom the Estate was devised, was in being, but 'tis otherwise here; and so the Judgment in the Common Pleas was affirmed without any farther Argument, but in Michaelmas Term following it was reversed in the House of Peers.

Nichols *versus* Pawlet.

In an Action on the Case the Defendant pleaded, that the Plaintiff was alienigena born in France under the Allegiance of the French King, adversarius Domini Regis & Domine Regine de patre & matre inimicis ipsorum Domini Regis, &c. nunc & eidem adversario suo adherens oriundus & ingressus in Regno Angliæ absq; salvo conductu, &c. Et hoc paratus est verificare ubi quando, &c. Et prout Curia dicti Domini Regis & Domine Regine consideraverit unde petit Judicium, &c.

The Plaintiff replied, quod ipse est indigena in Regno Angliæ sub ligeantia dicti Domini Regis & Dne. Regine nunc de patre & matre amicis eorundem Domini Regis & Domine Regine nunc oriundus & natus apud London. præd. in parochia & warda præd. & non alienigena prout præd. (the Defendant) superius allegavit & hoc petit quod inquiratur per patriam, &c.

The

The Defendant demurred generally, and it was adjudged that the Issue was not well taken, because the Plaintiff ought not to have concluded to the Countrey, for there being new matter set forth in the Replication, he should have given the Defendant Opportunity to rejoin.

D E

Term. Sanct. Trin.

Anno 6 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1694.Wilson *versus* Law.

Appeal
of Mur-
der.
1 Salk. 59.
2 Salk.
589.

Midd. ff. **J**ohannes Law
nuper de paro-
chia Sancti Egi-
dii in Campis
in Com. præd. generosus at-
tachiat. fuit per corpus suum
ad respondend. Roberto Wil-
son generoso fratri & hæredi
Edwardi Wilson generosi de
morte præd. Edwardi quon-
dam fratris sui unde eum
appellat & sunt pleg. de pro-
sequendo scilt. Carolus Wil-
liams de parochia sancti Ja-
cobi infra libertatem Westm.
in Com. præd. tapetarius
& Johannes Wheeler de pa-
rochia Sanctæ Mariæ le Savoy
in Com. præd. generosus &
unde idem Robertus Wilson
frater & hæres præd. Edwardi
Wilson in propria persona sua
instanter appellat præd. Jo-
hannem Law de eo quod ubi

prædict. Edwardus Wilson
fuit in pace Dei & Domini
Regis & Dominæ Reginæ
nunc apud prædict. parochi-
am Sancti Egidii in Cam-
pis in prædict. Com. Midd.
nono Die Aprilis Anno
Regni Domini Gulielmi &
Dominæ Mariæ Dei gratia
Angl. Scotiæ Franciæ & Hi-
bernæ Regis & Reginæ fi-
dei defensor. &c. sexto cir-
ca horam primam post me-
ridiem ejusdem diei ibi tunc
venit præd. Johannes Law
felonice ac ut felo dictorum
Domini Regis & Dominæ Re-
ginæ nunc infidiando & ex
malitia sua præcogitat. & in-
sult. præmeditat. contra pa-
cem dictorum Domini Regis &
Dominæ Reginæ nunc coro-
nam & dignitatem suas ac eis-
dem die Anno hora & loco vi
&

The Count.

& armis &c. felonice voluntarie & ex malitia sua præcogitata in ipsum Edwardum Wilson insultum fecit & præd. Johan. Law adtunc & ibm. cum quodam gladio de ferro & chalibe confecto valoris quinque solidorum quem ipse idem Johan. Law in manu sua dextra adtunc & ibm. extract. habuit & tenuit eundem Edwardum Wilson in & super superiorem partem ventris ipsius Edwardi Wilson juxta pectus & medium corporis ejusdem Edwardi adtunc & ibidem violenter felonice voluntarie & ex malitia sua præcogitata percussit pupugit & inforavit Anglice **did strike stab and thrust** in dans eidem Edwardo Wilson adtunc & ibidem cum gladio præd. in & super præd. superiorem partem ventris ipsius præd. Edwardi Wilson juxta pectus in medium corporis ejus unum vulnus mortale latitudinis duorum pollicium & profunditatis quinq; pollicium de quo quidem vulnere mortali idem Edwardus Wilson adtunc & ibidem instanter obiit & sic præd. Johannes Law adtunc & ibidem scilicet dicto nono die Aprilis Anno sexto supradicto circa horam primam post meridiem ejusdem diei apud præd. parochiam Sancti Egidii in Campis in Com. Middlesex præd. modo & forma præd. felonice voluntarie & ex malitia sua præcogitata præfat. Edwardum

*The place
where the
Wound
was.*

Wilson interfecit occidit & murdravit contra pacem dictorum Domini Regis & Domine Regine nunc Coronam & dignitatem suas Et quam cito idem felo dictus Johannes Law feloniam & murdrum præd. fecisset ipse idem Johannes Law fugit prædictusq; Robertus Wilson ipsum Johannem Law recenter insequutus fuit de villa in villam usq; quatuor villat. propinquiores & ulterius quosq; &c. & si dictus felo feloniam & murdrum pd. ei in forma præd. impositum velit dedicere idem Robertus Wilson hoc paratus est versus eum probare prout Curia, &c.

*Fugam
fecit.*

Et præd. Johannes Law in propria persona sua venit & petit auditum brevis de appello præd. & retorn. ejusdem brevis & ei leguntur in hæc verba scilicet Gulielmus & Maria Dei Gratia Angliæ Scotiæ, Franciæ, & Hiberniæ Rex & Regina fidei defensores &c. vicecom. Middlesex salutem quia Robertus Wilson generosus frater & hæres Edwardi Wilson generosi fecit te secur. de clamore suo proseguendo per Carolum Williams de parochia sancti Jacobi infra libertatem Westm. in Comitatu tuo tapetiarium & Johannem Wheeler de Parochia Sanctæ Mariæ le Savoy in Comitatu tuo generosum ideo tibi præcipimus quod attachias Johannem Law

*The De-
fendant
craves
Oyer of
the Writ
and Re-
turn.*

Law nuper de parochia sancti Egidii in Campis in Comitatu tuo generosum per corpus suum secundum legem & consuetudinem regni nostri Angliæ ita quod eum habeas coram nobis a die Paschæ in unum mensem ubicunq; tunc fuerimus in Anglia ad respondend. præfat. Roberto Wilson de morte præd. Edwardi quondam fratris sui unde eum appellat & habeas ibi tunc hoc breve Teste nobisipfis apud Westm. xix die Aprilis Anno regni nostri sexto, Martin. Virtute istius brevis mihi direct. Attach. feci infranominat. Johannem Law per corpus suum cujus quidem corpus ad diem infracontent. coram Dno. Reg. & Dna. Regina ubicunq; &c. parat. habeo prout interius mihi precipit. Respons. Thomæ Abney Militis & Willielmi Hedges Militis Vic. Quibus lectis & auditis præd. Johannes Law defendit vim & injuriam quando &c. & omnem feloniam & quicquid &c. & petit judicium de brevi originali & narratione præd. quia dicit quod breve illud & retorn. inde nec non narratio præd. superinde minus sufficien. in lege existunt ad compellend. eundem Johan. Law adinde respondend. quodq; ipse ad breve præd. sic ut præfertur retornat. seu ad narrationem præd. ut præfertur declarat. necesse non habet nec per legem terræ tenetur respondere & hoc

The Return.

Pleas in abatement to the Writ and Count.

paratus est verificare unde petit judicium de brevi retorn. & de narratione præd. & quod breve illud cassetur &c. & quoad feloniam & murdrum præd. idem Johannes Law dicit qd. ipse non est inde culpabilis & de bono & malo ponit se super patriam & præd. Robertus Wilson similiter &c.

And not guilty to the Murder, and Issue thereupon.

Et præd. Robertus Wilson quoad præd. placitum prædicti Johannis Law superius ad breve ipsius Roberti Wilson præd. in forma præd. placitat. dicit quod breve illud & retorn. inde ac materia in eisd. content. bona & sufficien. in lege existunt ad prædictum Johannem Law adinde respondere compellend. & hoc paratus est verificare unde ex quo dictus Johannes Law nihil allegavit aut assignavit in quo breve illud sive retorn. ejusdem malum vitiosum seu defectivum existit idem Robertus Wilson petit judicium & quod idem breve suum & dict. retorn. ejusdem bona & sufficien. in lege adjudicentur, &c. Et quoad præd. motionem in lege sive placitum prædicti Johannis Law ad narrationem ipsius Roberti Wilson præd. superius in forma præd. placitat. idem Robertus Wilson dicit quod narratio illa materiaq; in eadem content. sic ut præfertur declarat. bon. & sufficien. in lege existunt tam ad appellum suum præd. versus præfat. Johannem Law habend.

Joynder in Demurrer.

And the Court.

And the Court.

And the Court.

And the Court.

And the Court.

bend. manutenend. quam ad eundem Johannem Law adinde respondere compellend. quam quidem narrationem materiamq; in eadem content. idem Robertus Wilson paratus est verificare & probare prout Curia &c. Et quia præd. Jo-

hannes Law ad placitum illud non Respondet nec illud hucusque aliquo modo dedicit idem Robertus Wilson petit Judicium Et quod præd. Johannes Law de feloniam & murdro prædictis convincatur, &c.

Wilson versus Law.

1 Salk 59.
2 Salk.
489.

In an Appeal of Murder the Appellee after he had craved Oyer both of the Writ and Count demurred, and as to the felony and Murder pleaded not guilty. These Exceptions following were taken to the Count, and to the Return,

5 Rep.
120.
Rast.
Ent. 48. b.
Co. Entr.
53.

1. 'Tis said that the Person killed was on the 9th Day of April, &c. in the Peace of the King, &c. and that the Defendant circa horam primam of the same Day ex malitia sua præcogitata eisdem die & hora, &c. assaulted him; now circa horam primam is a very uncertain Allegation of the Time; and therefore of consequence eisdem die & hora, &c. insultum fecit must be as uncertain.

2. Here is no direct Charge against the Defendant; for the Words in the Declaration do not positively alledge that he gave the Wound, &c. 'tis percussit pupugit & perforavit Dans, &c. when it should have been deducit mortale vulnus, and so are the Precedents in the printed Entries.

2 Inst.
319.

3. There is no legal Venue; for the fact is alledged to be committed in Parochia, &c. when 'tis expressly required by the Statute of Gloucester, that it ought to be in some Vill or Town.

Dyer
199 a.
Co. Ent.
56, 57,
79.

4. The Return is Attachiari feci, when it should have been attachiavi, like the Writ which commands quod capias, the Return whereof is quod cepi, and never quod capi feci.

Where a Rescous is made from the Servant, the Sheriff in his Return must say that it was from himself, because he is the immediate Officer of the Court: Now in this Case it doth not appear whether the Sheriff himself or his Bailiff attached the Defendant; and if by a Bailiff then the Return by

by the Sheriff is not good, unless it was by a Bailiff of a franchise; and for this purpose the Year-book of 2 H. 4. 4 b. was cited, viz. King Edward the Fourth granted to a certain Person the Office of Bailiff itinerant in Hampshire, and Execution of Writs, &c. and the Sheriff of that County returned a Writ thus, viz. Mandavi Ballivo itineranti qui habet retorn. &c. per Chartam Regis qui mihi nullum dedit responsum; and he was amerced for this Return, because the Bailiff itinerant was not a Bailiff of a franchise.

Now it cannot be objected that this is helped by the Appearance of the Defendant; 'tis true, he came in and appeared upon the Return, but demurred for this fault, which is all the Appearance he made, so that he is now in Court to shew this insufficient Return. 1 Bull. 76.

Neither is it an Objection to say that the Sheriff's Return is not traversable, as in an Appeal of Murder, the Original was returnable Octab. Mich. which was the first Return of Michaelmas Term, but the Writ was not delivered to the Sheriff to execute till the sixth of November following, and there he returned tarde, which tho' true, yet it was held that the Party might traverse it. 348 b.

But the Case which was chiefly relied on was between Morgan and Egerton, Mich. 8 Jacobi, as an Authority in point, viz. an Appeal of Murder, the Writ was returnable Octab. Mich. the old Sheriff returned, Quod cepi Corpus & paratum habeo, &c. and the new Sheriff before the Prisoners were delivered over to him returned, Quod istud breve sic mihi deliberat. fuit indorsatum; and upon a Demurrer this was held an ill Return, because he had returned nothing done by himself, he said nothing of the Body of the Prisoner, and the Count being against him in Custodia vicecomitis, it doth not appear that the new Sheriff ever had him in Custody, and he shall not be intended to be in Custody of the old Sheriff, because he is no Officer of the Court after a new one is chosen, and tho' the Party then appeared gratis, yet it was held that such an Appearance will not make that good which was defective before upon the Return it self. 1 Bull. 69.

Econtra. The Counsel for the Appellant answered only the last Exception which seemed to be the most material, viz. That there was no Difference between Attachiari feci, and Attachiavi, where the Return was not made by a Bailiff of a Liberty, and this could not be intended to be a Return by a Bailiff of a franchise, because that is always special, Keilw. 58.
2 Roll. Rep. 225.
1 Roll. Abr. 779.
placit. 3.

viz. Mandavi Ballivo libertatis, which is not in this Case, so it must be a Return by the Sheriff himself, and it might have been done by an Itinerant Bailiff, and 'tis then the Act of the Sheriff himself; for what he had caused to be done by another shall be taken to be done by him.

In the Common Case of Attachments the Return is quod infranominatus (the Defendant) attachiatus est per plegios, which being in the present Tense is so uncertain, that it cannot be said by whom he was attached, yet such Returns are held good.

But the Words which follow in this Return make it very certain, for after attachiari feci, the Sheriff saith, cuius quidem corpus paratum habeo prout interius mihi præcipitur.

Curia. (1.) By the Statute of Gloucester the Time and Place where the Fact was committed ought to be certainly expressed, or otherwise the Appeal shall be abated; now circa horam primam is a certain and sufficient Averment of the Time, 'tis within the Compass of an Hour, and tho' in Egerton and Morgan's Case, three Judges were of a contrary Opinion, yet even there Coke and Williams held that it was certain enough, and the Reasons of those two Judges seem to be better warranted by Law, than the Opinions of the other three, and so have the Precedents been ever since that Time.

4 Rep. 40.

'Tis true, the Fact cannot be alledged to be done with such a seeming Uncertainty, as dedit plagam mortalem circiter pedus, nor the Year or the Day, but the Hour may, because there is more Difficulty in alledging the very Hour than the Day or Year which are longer Measures of Time, and therefore are more certain; but my Ld. Coke was of Opinion that it was not needful for the Appellant to give in Evidence the precise Hour or the Day it self mentioned in the Declaration.

2 Inst. 3:8.

(2.) The Charge is direct against the Defendant by the Word Dedit, and it had been more uncertain by the Word dedit.

1 Inst. 125.

(3.) It shall be intended that the Parish is a Vill, unless otherwise shewed by the Defendant, and pleaded in Abatement; for tho' the Word Parochia is uncertain, because it may include divers Vills, yet it shall be intended a Vill, unless the Contrary is shewn.

By the Statute of 1 H. 5. cap. 5. 'tis ordained that in original Writs in personal Actions, and in Appeals and Indictments wherein Executions may be awarded, that Additions shall be made of the Estate, Degree, and Mystery, and likewise

likewise of the Town, Hamlet, Places or Counties where the Party is conbersant, and if any of these are omitted, the Writ shall be abated; and yet where no Vill is in a Parish, the Writ shall be good, viz. præcipe A. de parochia, &c. because that may be the Place where the Defendant inhabits.

(4. Attachiari feci prout interius mihi præcipitur, is a full Answer to the Writ; the usual Return to a Levavi facias is quod levavi feci; so in a Scire facias against K. the Sheriff returned, quon scire feci K. prout istud breve in se exigit, without saying infra nominat K. yet it was held that those Words supply that Omission.

In Rescous the Return was that the Party was rescued out of the hands of the Bailiff; it was objected that it should have been out of the Hands of the Sheriff unless the Arrest was by a Bailiff of a Franchise; yet the Return was held good, and so it was in this Case.

22 H. 6. 41.
Br. tit. Ad-
dition placi-
to 38, 14.
35 H. 6. 30.

1 H. 6. 6:
Br. tit. Re-
torn del
Brief plito.

64.
5 Cro. 242.
Sid. 332.

Rex & Regina *versus* Owen.

By the Statute of 1 Will. & Maria the Custos Rotulorum is to appoint and nominate the Clerk of the Peace when the Place is void, who hath Power by the Act to execute it by himself or Deputy for so long Time only as he shall demean himself well, &c.

A Mandamus was brought by Mr. Owen, directed to the Justices of the Peace of Kent to restore him to the Office of Clerk of the Peace of that County; and upon the Return thereof, the Case appeared to be thus (viz.) The Earl of Winchelsea who was Custos Rotulorum, Anno 1 Will. & Maria, did appoint Mr. Owen to be Clerk of the Peace durante beneplacito, &c. then the Act of 1 Will. & Maria was returned; and that the said Earl was dead, and afterwards the King did constitute the Lord Sydney to be Custos, who appointed Mr. Saunders to be Clerk of the Peace, pursuant to the aforesaid Act, who thereupon took upon himself the said Office, and displaced Mr. Owen who by this Writ desired to be restored.

The Question was, Whether a Grant of this Office, durante beneplacito, which is only an Estate at Will, shall be so governed by the Act as to make it an Estate for life, when once the Person is admitted to the Office; so that let the Custos make what Appointment he will, tho' not pursuant

2 Mod. 314.

to the Statute, 'tis the Act and not the Custos which giveth an Interest, and Estate to the Person.

'Tis true, before the Statute of 1 Will. & Maria the Clerk of the Peace was dependent upon the Custos, not only for his Nomination, but for his Continuance in the Office; but now the Custos has no Manner of Interest in the Office itself; he is only to nominate the Person who shall have it, and when such Nominee is admitted, he is not to be removed at the Pleasure, or by the Death of the Custos; for the Intent of the Act is to have a Person who should behave himself well in his Place, and that he should not be dependent of any Man, for that might be a means to make him otherwise; and because the Justices of the Peace and the People have an Interest in this Office (viz.) in entering Records, and drawing up Indictments, and dispatching the Business of the Sessions, therefore the Act fixes him in his Office, and giveth him a more lasting Estate therein than he had before, so as not to be removed by the Death, or at the Pleasure of the Custos.

And this appears more plain by the Penning of the Act itself; for after the Custos hath nominated the Person, he must be admitted by the Justices in their Quarter-Sessions, and is to be removed by them if he misbehave himself; and upon such Removal, if the Custos should not appoint another, the Justices have Power to do it.

Now the Words in this Grant to Mr. Owen (viz.) That he should have the Office durante beneplacito of the Earl of Winchelsea, cannot make the Nomination void ab initio, but the Words themselves are void and useless, because they are contrary to the Statute, which giveth no Power to create this Officer under that Limitation, but for so long Time only as he shall behave himself well; neither shall the Acceptance of the Grant alter the Case, because when once the Person is admitted to the Office, 'tis the Statute, and not the Grantor which giveth him an Interest for Life; for by nominating the Person the Grantor hath executed his Power and hath no farther Authority to modify what Interest the Grantee shall have in his Office.

'Tis like a Person presented to a Living during the Pleasure of the Patron, the Presentation is good, but the Limitation is void: because by the Usage and Custom of the Kingdom a more durable Estate is fixed in the Presentee.

So an Institution by the Bishop during pleasure, the first is good, and not to be defeated by the subsequent Limitation.

The Cases seem to be parallel, for the Estate of this Officer is as well fixed by this Act of Parliament as the Estates of those are at the Common Law; and therefore the Words habendum during pleasure, ought to be rejected out of this Grant as useless and insignificant.

'Tis true, in Conveyances where the Party may grant a greater or lesser Estate, there the Habendum is of great Use either to enlarge or limit the Thing granted; but it cannot be usefull where an Act of Parliament fixes an Interest, as in this Case.

Many more Instances may be given where the Premises in a Deed or Grant may be good, and the Conditions void: If a Feoffment be made in Fee upon Condition not to alien, the Feoffment is good, but the Condition is void; so if a Gift in Tail is made upon Condition that the Donee shall not suffer a Common Recovery, the Gift is good, but the latter Clause is void; and for these Reasons it was prayed, that the Mandamus might be granted.

Econtra. The Act of 1. Will. & Maria doth not give the Clerk of the Peace an Estate for Life, it gives the Custos Power to name him, but not to execute the Office for his Life, but only for so long Time as he behaves himself well.

Now the Nomination and the Limitation of the Estate of the Nominee shall not be taken distingly and apart, for it all makes an entire Appointment, and therefore must be taken together; and this being during pleasure, is void ab initio; and if so, the Act hath made no more of it than the Grantor himself hath done.

Judicium. Afterwards in Hillary Term Judgment was given, That no peremptory Mandamus should go; for by the Act of 1 W. & M. the Custos is to nominate a Clerk of the Peace to execute that Office for so long Time as he shall well demean himself, &c. and if he appoint him in any other manner, he is no Clerk of the Peace; therefore the Defendant being appointed by the Earl of Winchelsea during pleasure, 'tis not pursuant to the Act, for he hath not executed the Authority given to him by the Act, and so the Defendant hath no Title.

Newton *versus* Richards.

Pasch. 6. Rot. 97.

1 Salk.
296.

SCire facias against an Administrator to shew Cause why the Plaintiff should not have Execution upon a Judgment which he obtained against the Intestate?

The Defendant pleaded, quod nulla habet bona & catalla quæ fuerunt (Intestati) tempore mortis suæ in manibus suis administrand. nec habuit die impetrationis brevis præd. nec unquam postea; and upon a general Demurrer to this Plea, it was objected, that it was not good, because the Charge was by a Judgment, which must be answered in the Plea by a Discharge of Debts upon Judgment; for the Administrator might pay Debts upon Specialties and otherwise, and so have nulla bona remaining in his Hands; but such an Administration shall not bar the Plaintiff of this Action, and so it was adjudged in the Case of Ordwey and Godfrey.

Cro. E.
liz. 575.
which
Case was
denied
to be
Law per
101. am. Cu-
riam. A-
leyn 48.

But notwithstanding this Objection, the Plea was held good, especially upon a general Demurrer, as this was; but if the Plaintiff had demurred specially, and shewed it for Cause, it might have been otherwise.

Combes *versus* Hundred de Bradley.

An A-
ction upon
the Sta-
tute of
Winton,
for a Rob-
bery.

Glouc. ff. **H**omines inhabi-
tantes in Hun-
dred. de Bradley in Com.
Glouc. attachiati fuerunt ad
respondend. tam Domino Re-
gi & Domina Regina nunc
quam Thomæ Combes qui
tam pro eisdem Domino Re-
ge & Domina Regina quam
pro seipso sequitur de pla-
cito quare cum in Statuto in
Parlamento Domini Edwar-
di nuper Regis Angliæ primi
apud Winton. Anno Reg-

ni sui tertio decimo tent. 13 E. pri-
edit. inter cætera ordinat. sit
pro eo quod de die in diem
robore homicide & incen-
dia plus solito tunc fie-
bant quam antea solebant
& felones non potuissent esse
attinct. per sacramentum Jur.
qui magis voluntarie per-
mittebant felonias fieri gen-
tibus extraneis & felones eva-
dere absque pœna quam ma-
lefactors indictari unde mag-
na pars fuer. gentes de ea-
dem

dem patria vel ad minus si malefactores fuer. de alia patria eorum receptores fuer. de vicineto ubi hujusmodi feloniam fiebant & hoc faciebant pro eo quod sacramenta eisdem Jur. de eadem patria ubi feloniam ill. fiebant non ministrabantur & quod restitutio dampnorum poena antetunc non fuit provis. pro concealamento & negligentia suis idem nuper Rex ad debilitand. posse felon. stabilivit poenam in illo casu ita quod pro timore poenae plusquam pavore Sacramenti nullis extunc parcerent nec aliquas felon. extunc imposterum concealarent & mandavit quod proclamatio solempniter fieret in omnibus Comitatibus Hundred. Mercat. Feriis & omnibus aliis locis ubi solempnis assembleatio gentium foret sic quod nulli per ignorantiam se possint excusare quod quaelibet patria extunc sic possit custodiri quod immediate post roborias & felonias factas recens insecutio fieret de villa in villam & patria in patriam ac etiam inquisitiones fierent si necesse foret in villis per ipsum qui superior esset de villa & postea in Hundred. & Franchet. & in Com. & aliquando in duobus tribus vel quatuor Comitatibus in casu quando feloniam facta fuer. in Marchiis Comit. ita quod malefactores potuissent esse attinct. & si patria de hujusmodi malefactoribus

non responderet poena talis esset quod quaelibet patria scilicet homines in patria commorantes responderent de roboriis factis & dampnis sic quod totum Hundredum ubi roboria illa facta foret cum Franchet. quae essent infra praecinct. ejusdem Hundredi responderent de roboriis factis & si roboria illa facta foret in divisis duorum Hundredor. responderent inde ambo Hundred. simulcum Franchet. infra eadem & longiorem terminum non haberet patria post roboriam & feloniam fact. quam quadraginta dies infra quos faceret emendas de roboriis & malefactis vel responderent de corporibus malefactorum prout in eodem statuto plenius continetur Ac cum quidam malefactor. re praefat. Thomae ignoti 23 die Februarii Anno Regni dictorum Domini Regis & Dominae Reginae nunc quinto apud Hampnot infra Hundred. de Bradley in Com. Gloucest. in alta regia via ibidem vi & armis in ipsum Thomam insultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis de denariis ipsius Thomae propriis tunc ibidem invent. felonice de eodem Thoma ceperunt spoliaverunt & asportaverunt contra pacem Domini Regis & Dominae Reginae nunc idemque Thomas immediate post feloniam roboriam & spoliationem praedict. fact apud Northleach infra

The Robbery set forth.

The Money taken.

*Oath
made be-
fore a
Justice of
Peace.*

27 Eliz.

fra Hundred. præd. Hutesiam & Clamorem de roboria & feloniam præd fecit & adtunc & ibidem notitiam inhabitantibus ejusdem villæ de Northleach præd. de roboria & feloniam prædict. dedit & post roboriam & feloniam illam & infra viginti dies prox. ante diem impetrationis Brevis originalis ipsius Thomæ idem Thomas coram Thoma Masters Armigero tunc & adhuc uno Justiciar. dictorum Domini Regis & Dominæ Reginæ nunc ad pacem infra Com. Gloucester. conservand. assignato tunc inhabitan. apud Cirencester. prope præd. Hundred. de Bradley præd. in Com. præd. examinatus fuit super sacramentum suum corporale juxta formam Statuti apud Westm. Anno Regni Dominæ Elizabethæ nuper Reginæ Angliæ &c vicefimo septimo inde edit. & provis. Idemq; Tho. Combes super sacramentum suum præd. tunc dixit quod ipse non cognovit partes quæ roboriam ill. fecissent nec earum aliquam & post roboriam illam fact. quadraginta dies jam præterierunt iidem tamen homines inhabitantes in Hundred. prædict. emendas de roboria prædict. Thomæ Combes hucusque non fecerunt nec corpora felonum & malefactorum prædict. nec corpus eorum alicujus ceperunt nec de corporibus eorum aut de corpore eorum alicujus hucusque responder. sed malefacto-

res & felones ill. evadere permiserunt in dictorum Domini Regis & Dominæ Reginæ nunc contemptum & ipsius Thomæ Combes grave dampnum & contra formam Statut. prædict. & unde idem Thomas Combes qui tam, &c. per Samuelem Brewster Attornatum suum queritur quod cum quidam malefactores præfat. Thomæ Combes ignoti in alta regia via vicefimo tertio die Februarii Anno Regni Domini Gulielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ, &c. quinto apud Hampnot in Com. Gloucester. infra Hundred de Bradley in Comitatu prædict. vi & armis (viz.) baculis gladiis & cultellis in ipsum Thomam Combes insultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis de denariis ipsius Thomæ Combes propriis tunc ibidem invent. felonice de eodem Thoma Combes adtunc & ibidem ceperunt spoliaverunt & asportaverunt contra pacem dictorum Domini Regis & Dominæ Reginæ nunc idemq; Thomas Combes immediate post feloniam roboriam & spoliationem prædict. fact. apud Northleach infra Hundred de Bradley præd. prope præd. locum ubi roboria præd. sic ut præfertur fact. fuit Hutesiam & Clamorem de roboria & feloniam prædict. fecit & adtunc & ibidem notitiam inhabitantibus

*The Count
upon the
Writ.*

tibus ejusdem villæ de North-leach præd. de roboria & feloniam præd. fact. dedit & post roboriam & feloniam ill. fact. & infra viginti dies proximos ante diem impetrationis brevis originalis prædict. Thomæ Combes idem Thomas Combes coram præfat. Thoma Masters Armigero tunc & adhuc uno Justiciar. Domini Regis & Dominae Reginae ad pacem in Com. præd. conservand. assign. inhabitante apud Cirencestr. prope præd. Hundred. de Bradley præd. in Com. præd' examinatus fuit super sacramentum suum corporale juxta Statutum apud Westm. in Comitatu Middlesex. Anno Regni Dominae Elizabethæ nuper Reginae Angliæ vicesimo septimo inde editum & provisum idemque Thomas Combes super sacramentum suum præd. tunc dixit quod ipse non cognovit partes quæ roboriam illam fecissent nec earum aliquam & quod post roboriam illam factam quadraginta dies jam præterier. iidem tamen homines inhabitantes in Hundred. de Bradley prædict. emendas de roboria præd. præfat. Thomæ Combes hucusque non fecerunt nec corpora felonum & malefactorum præd. nec corpus eorum alicujus ceperunt nec de corporibus eorum seu de corpore eorum alicujus hucusque responder. sed malefactores & felones illos evadere per-

miserunt in dictorum Domini Regis & Dominae Reginae nunc contemptum & ipsius Thomæ Combes grave dampnum & contra formam Statut. prædict. de Anno Regni præd. nuper Regis Angl. Edwardi primi decimo tertio supradicto editi unde dicit quod deterioratus est & dampnum habet ad valentiam 50 l. Et inde producit Sectam, &c.

Et præd. homines inhabitantes infra præd. Hundred. de Bradley præd. per Richardum Longford Attornatum suum ven. & defend. vim & injuriam quando &c. Et quicquid &c. & dicunt quod ipsi in nullo sunt culpabiles de præmissis eis impositis prout præd. Tho. Combes qui tam &c. superius versus eos queritur Et de hoc ponunt se super patriam & præd. Thomas Combes qui tam &c. inde similiter &c. Et super hoc idem Thomas Combes dicit qd. præd. homines inhabitantes infra hundred. de Bradley præd. ubi roboria præd. facta fuit sunt partes defendentes versus quas idem Thomas Combes qui tam &c. superius in forma præd. superius queritur & ea de causa petit breve dictorum Domini Regis & Dominae Reginae vicecomiti Comitatus præd. dirigend. de venire faciend. coram dict. Domino Rege & Domina Regina ubicunque &c. duodecim, &c. de vicineto hundredi de ~~Slaughter~~ in
Q q 2 Comi-

Not
guilty
pleaded:

Sugge-
stion for
a Jury
of another
Hundred:

Comitatu præd. quod quidem hundred. de **Slaughter** est proximum hundred. in eodem Comitatu præd. hundred. de Bradley proxime adjacen. ad triandum exitum præd superius in forma præd junct' Et quia præd. homines inhabitantes infra hundred. de Bradley præd. hoc non dedicunt ei conceditur &c. Ideo præceptum est vicecomiti præd. qd. venire faceret coram dictis Dno. Rege & Dna' Regina in Octabis purific' beate Mariæ ubicunq; &c. duodecim &c. de vicineto præd. hundredi de **Slaughter** præd. per quos &c. & qui nec &c. ad Recogn. &c. quia tam, &c. idem dies dat. est tam præfat. Tho. Combes qui tam &c. quam præd. hominibus inhabitantibus in præd' Hundred. de Bradley præd. &c. postea continuatur inde processus inter partes præd. de placito præd. per Jur' posit. inde inter eas in respectu coram Domino Rege & Domina Regina usq; a die Paschæ in 15 dies ubicunq; &c. extunc proxime sequen. nisi Justiciarii Domini Regis & Dominae Reginae ad Assizas in Comitatu præd' capiendas assign' prius die sabbati 3 die Martii apud Gloucester in Com' præd. per formam statuti &c. ven. pro defectu jur. &c. ad quem diem coram Domino Rege & Domina Regina apud Westm. venerunt partes prædict. per attornatos suos prædict. &

præfat. Justiciarii dictorum Dni. Regis & Dnae Reginae coram quibus &c. mis. hic recordum suum coram eis habit. in hæc verba Postea die & loco infracont. coram Egidio Eyre Milit. uno Justitiar. Domini Regis & Dnae Reginae ad placiatam coram ipsis Rege & Regina tenend' assign' & Thoma Breton Armiger. eidem Egidio Eyre & Nicholao Letchmere Militi uno Baronum Scaccarii Dictorum Domini Regis & Dominae Reginae Justitiariis ipsorum Domini Regis & Dominae Reginae ad Assizas in Comitatu Gloucester capiend. assign' per formam statuti &c. hac vice associat. præsentia præd' Nicholai Letchmere non expectata virtute brevis dictorum Domini Regis & Dominae Reginae de si non omnes &c. venerunt tam infranominat. Thomas Combes qui tam pro Domino Rege & Domina Regina quam pro seipso in hac parte sequitur quam infra script' homines inhabitantes in Hundred. de Bradley per attornatos suos infracontent. & Jur. Juratae unde infra fit mentio exact. ven' qui ad veritatem de infracontent. dicend. elect. triat. & jurat. dicunt super sacrament. suum quod quidam Malefactores præfat. Thome ignoti 23 die Februarii Anno Regni dictorum Domini Regis & Dominae Reginae nunc Regis & Reginae Angliæ, &c. quinto apud

*The Po-
sea.*

*Special
Verdict.*

pud Hampnot infra Hundred. de Bradley in Comitatu Gloucester in alta regia via ibidem vi & armis in ipsum Thomam insultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis ibidem invent. felonice de eodem Thomaceperunt spoliaverunt & asportaverunt contra pacem Dni. Regis & Dnæ Reginæ nunc idemque Thomas immediate post feloniam roboriam & spoliation. infrascript. fact. apud Northleach infra Hundred. præd. hurtesium & clamorem de roboria & felonia infrascript. fecit & adtunc & ibidem notitiam inhabitantibus ejusdem villæ de Northleach præd. debito modo de roboria & felonia infrascript. fact' dedit & post roboriam & feloniam illam fact. & infra viginti dies prox. ante diem impetrationis brevis originalis ipsius Thomæ idem Thomas coram Thoma Masters Armig. adtunc & adhuc un. Justiciar. dictorum Domini Regis & Domine Reginæ nunc ad pacem in præd. Comitatu Gloucester conservand. assign. inhabitante apud Cirencester prope præd. Hundred. de Bradley in Comitatu prædict. infrascript. examinatus super sacramentum suum corporale juxta statutum apud Westm. Anno Regni Domine Elizabethæ nuper Reginæ Angliæ, &c. 27 inde edit. & provis. & super sacramentum suum prædict. coram præd. Thoma Masters tunc deposuit modo & forma prout

postea mentinnat. est & non aliter Gloucester. Memorand. That upon the 7th Day of June in the 5th Year of the Reign of our Sovereign Lord and Lady King William and Queen Mary, over England, &c. Annoq; Domini 1693. Thomas Combes of Fairford in the County of Gloucester, Serbant to Andrew Barker of Fairford aforesaid, Esq; came before me Thomas Masters, Esq; one of their Majesty's Justices of the Peace for the said County of Gloucester, and took his corporal Oath, That upon Thursday the 23d Day of February last past, between the Hours of two and three of the Clock in the Afternoon of the same Day, as the said Thomas was travelling from Fairford aforesaid, towards Tewsbury in the said County of Gloucester, he was set upon in a field near Hampnot in the Hundred of Bradley in the said County of Gloucester by three Horsemen armed with Swords and Pistols, who there made an Assault upon him the said Thomas Combes, and did then and there feloniously take from him the said Thomas Combes 30 l. 12 s. 6 d. and one sorrel Mare, which Mare is since returned to Fairford aforesaid. *Thirty Pounds and eleven Shillings, of which said Money was the*

*The Oath
of the
Party
robbed.*

The Money was the Money of another, and not of the Plaintiff.

the proper Money of the said Andrew Barker his Master, and the other one Shilling and Sixpence was the proper Money of him the said Thomas Combes, and the said Thomas Combes farther deposed, That the said three Horsemen which so took away the said Money and Ware from him were Strangers and altogether unknown to him the said Thomas Combes and that the said Thomas Combes immediately after he was so robbed went to Northleach a Market Town in the said Hundred, and there made Hue and Cry after the said Persons that robbed him, Et iidem Jur. ulterius super sacramentum suum præd. dicunt quod 39 l. 12. s. 6. d. in narratione infra script. mentionat fuerunt propriæ monetæ Andree Barker Armigeri ad tunc Magistri præd. Thomæ Combes recept. per prædict. Thomam Combes pro usu præd. Andree Barker Magistri sui & iidem Juratores ulterius super sacramenta sua præd. dicunt quod prædict. Andreas Barker non fuit præsens quando roboria prædicta facta fuit sed utrum super totam materiam per juratores prædict. in forma prædicta compertam prædict. inhabitantes in hundredo de Bradley sunt culpabiles de præmissis in narratione infra script. interius eis imposit. contra formam statuti in narratione mentionat. necne juratores

præd. penitus ignorant & inde petunt advisamentum & considerationem Curia, &c. Et si super totam materiam prædict. per juratores prædict. in forma præd. compertam videbitur Curia dictorum Domini Regis & Dominae Reginae hic quod præd. inhabitantes in Hundredo de Bradley præd. sunt culpabiles de præmissis in narratione infra script. interius eis impositis contra formam statuti præd. tunc juratores prædict. super sacramentum suum præd. dicunt quod præd. inhabitantes in Hundredo de Bradley prædict. sunt inde culpabiles prout præd. Tho. Combes qui tam &c. interius versus eos queritur & assidunt dampna ipsius Tho. Combes occasione infra script. ultra mis. & custagia sua per ipsum circa sectam suam in hac parte apposit. ad 30 l. 12 s. 6. d. & pro mis. & custagiis ill. ad quadraginta solidos Sed si super totam materiam prædict. per Jur. præd. in forma præd. compertam videbitur Curia dictorum Domini Regis & Dominae Reginae hic quod inhabitantes de Hundredo de Bradley prædict. non sunt culpabiles de præmissis prædict. tunc juratores prædict. super sacramentum suum prædict. dicunt quod prædict. inhabitantes Hundred. de Bradley præd. non sunt culpabiles prout prædict. inhabitantes Hundred. de Bradley prædict. interius pro se placitando allegaverunt sed quia Cur. dict.

Dom. Regis & Dnæ. Regina
nunc hic de Judicio suo de &
super præmissis redend. non-
dum advisatur dies inde dat.
est partibus præd. coram Dom.

Rege & Dna. Regina usq;
ubicunq; &c. de judicio
suo inde audiend. eo qd. Cur.
dict. Dom. Regis & Dnæ. Regi-
næ nunc hic inde nondum &c.

Combes versus Hundred de Bradley.

The Case upon the Pleadings was (viz.) An Action was ^{2 Salk. 613.} brought upon the Statute of Winton, for that upon the three and twentieth day of February 5 Will. & Maria certain Malefactors to the Plaintiff unknown, did assault him at Hampnot in the Hundred of Bradley in the County of Gloucester, and robbed him of 30l. 12s. 6d. of his own Money, whereof he immediately gave Notice at Northleach within the said Hundred, and near the Place where he was robbed, and that none of the Thieves were taken.

Upon Not guilty pleaded, a special Verdict was found at the Assizes (viz.) the Jury find the Assault, Robbery and Taking from the Plaintiff 30l. 12s. 6d. and a Mare which returned, and that 30l. 11s. of the said Money, was the proper Money of Andrew Baker his Master, who was not present when the Robbery was committed, but that the Plaintiff had the same in his Possession for the Use of his said Master and that the Robbers were Strangers to him, and so made a general Conclusion.

The single Question was, Whether the Servant being robbed of his Master's Money (he being not present) may bring the Action against the Hundred, and declare de denariis suis propriis being taken away?

Sir Francis Winnington held, that the Action was well brought, tho' it appears both by the Affidavit and Verdict that it was the Money of the Master; for it was the usual Course in former times for the Servant alone to bring the Action, and the Master seldom or never appeared in it. The Statute of Ed. 1. was made for the general Preservation and Quiet of Travellers, whether Masters or Servants, and therefore either of them might bring the Action. This was the Opinion of Dodderidge and Jones, who were learned Judges in the Case of Drope and Thaire, reported by Mr. Latch; ^{Latch. 127.} nay, in some Cases it hath been ruled, that the Master ought not to bring the Action, because the Servant (being the Person robbed

Cro. Eliz. 142. robbed) is enjoined by the Statute of 27 Eliz. to make Oath that he did not know any of the Robbers.

1 Leon. 325.
idem.

2 Leon. 82.

A Bailiff or Receiver of Rents was robbed, and he declared de denariis ipsius querentis, and it was held good, because he is accountable to his Master, which is this very Case: Where-ever the Party has a Property, he may bring the Action against the Wrong-doer; And this is the Reason why a common Carrier may sue for Goods taken from him, tho' not his own.

1 Brownlow 155.

But there is a Case which comes yet more near to this; it was an Action brought by a Servant who was robbed of Goods, part of which were belonging to his Master, and the rest to himself; and he declared in his own Name against the Hundred, and had a Verdict as to his own, and the matter was found specially as to the Goods of his Master; yet he had Judgment, which must be upon the special Finding; and for these Reasons, and upon these Authorities he prayed Judgment for the Plaintiff.

Econtra. It was argued, That the Master ought to bring the Action because it was his Money which was lost; but for the Servant to declare de denariis suis is not true; for he had no Property in the Money, neither is he answerable for its being taken from him.

This is not like the Case of a Common Carrier, for he has a Reward and a Recompence for carrying the Goods of other Men, and therefore is responsible for them by Law, if lost or taken from him, which a Servant is not.

2 Saund. 47.

If a Sheriff levies Goods by Virtue of a Fieri facias, which Goods are afterwards taken from him, tho' they are not his own, yet he may maintain an Action of Trover; the Reason is, because by the Seizure he has a Property in them by Law; but a Servant has no manner of Property in the Money or Goods of his Master, and therefore if robbed, either his Master being present or absent (for that makes no Alteration in the Case) the Master who hath the Property, must bring the Action.

Thus it was adjudged in the Case of Raymond against the Hundred of Working; the Servant made the Oath, and the Master brought the Action, and resolved so it ought to be; and upon a Writ of Error brought in B. R. that Judgment was affirmed.

So it was likewise in that very Case of Drope and Thaire cited on the other Side, viz. The Servant lodged in an Inn, and his Master's Goods were lost, who brought the Action; and tho it was

was said by Doderidge and Jones that the Servant might have an Appeal of Robbery, yet it seems to be only a sudden Opinion of those Judges, for the Law is otherwise, viz. That the Servant cannot bring an Appeal, and in the same Case reported by Justice Popham, Justice Jones was of another Opinion viz. That if the Servant is robbed, the Master shall bring the Action. Pop. 178.
179.

In 31 Eliz. the Servant was robbed, and the Master brought the Action and had recovered a Verdict, but because the Oath was made by him, and not by the Servant who was robbed, the Judgment was stayed; for he might know some of the Robbers, tho' his Master did not. Cro. Eliz.
142.
1 Leon. 323.

In 7 Jac. 1. a Man by counterfeit Letters got Money out of the Servants Hands, and the Master brought an Action on the Case for the Deceit. 2 Cro. 224.

And in the same Year the Servant being robbed in an Inn, the Master brought the Action, and had Judgment, which was affirmed afterwards in the Exchequer-Chamber. 2 Cro 223.
Co. Entr.
347.

So where the Master was present when his Servant was robbed, yet the Master brought the Action against the Thief. And likewise where a Post-boy was robbed in the Presence of the Owner of the Goods, and he brought the Action. Yel. 162.
Style 156,
319.

These and many more Cases may be brought to prove that it hath been the constant Opinion, that the Master ought to bring the Action where the Servant hath been robbed.

Then as to the Possession, 'tis not at all material to support the Action brought by the Servant, for 'tis the Property only which is to be considered; and for this Purpose a late Case was cited, which was between Pinkney and the Inhabitants of the East-Hundred in Rutland, viz. The Plaintiff brought an Action upon the Statute of Winton, and declared for the taking from him of 29 l. de pecuniis propriis and likewise * for other Goods taken out of his Possession, and upon a Demurrer to the Declaration it was held, That the Action was not well brought for the Goods taken out of his Possession; and therefore as to them he entered a Remise dampna, and had Judgment for his Money, which shews that the bare Possession without a Property, was not regarded. Adjournatur. 2 Saund. 379.

* But did not name them in particular, and that was the Reason of the Judgment as to the Goods.

Afterwards the Plaintiff had Judgment by the Opinion of the whole Court, and that in this Case either the Master or the Servant might maintain the Action,

D E

Term. Sanct. Mich.

Anno 6 Gulielmi & Mariæ Regis &
Reginæ in Banco Regis, 1694.

Lampton *versus* Collingwood.

1 Salk.
262.

Plita.

Placita coram Domino Rege apud Westm de Termino Sancti Hilarii Anno Regni Domini Willielmi tertii Regis Angliæ sexto Rot. 309.

Writ of
Audita
Querela.

Angl. ff. Dom. Rex mandavit Justic. suis ad Placita coram ipso Rege tenend. assign. Breve suum clausum in hæc verba ff. Gulielmus tertius Dei Gratia Angl' Scoc' Franc' & Hibern' Rex fidei defenſ. &c. Justic' nostris ad Placita coram nobis tenend. assign salutem Ex gravi querela Annæ Lampton vid. Administratricis bonorum & catallorum quæ fuer. Roberti Lampton Armigeri defunct' accepimus quod cum quidam Lucas Collingwood nuper scilicet Termino Pasche Anno

Regni Dom. Caroli secundi nuper Regis Angliæ &c. tricesimo quarto in Curia ejusdem nuper Regis coram ipso nuper Rege apud Westm. in Com. Midd. per Judicium ejusdem Curia recuperasset versus præfat. Robertum Lampton & quendam Edmundum Craister Armigerum per nomina Edmundi Craister de Craister in Com Northumbriæ Armigeri alias dict. Edmund Craister de Craister in Com. præd' Armiger & Roberti Lampton de Newham in Com Northumbriæ Armigeri alias dict' Robertum Lampton de Newham in Com. præd. Gen' quadringentas libras de debito necnon quadraginta solid. qui eidem Lucæ in eadem Curia adjudicat. fuer. pro dampnis suis quæ sustinuit tam occasi-

Judg-
ment re-
corded
against
two De-
fendants.

one

One of the
Defen-
dants dies,
and the o-
ther sur-
vives.

one detentionis debiti illius quam pro mis. & custagiis suis per ipsum circa sectam suam in ea parte apposit. unde convict. fuer. prout per Recordum & Processum inde in Curia nostra coram nobis apud Westm' prædict. residen. plenius apparet Posteaq præd' Robertus in vita præd. Edmundi scilicet primo die Novembris Anno Regni Domini Jacobi secundi nuper Regis Angliæ primo obiit & idem Edmundus ipsum Robertum supervixit videlt. apud Morpeth in Com. Northumbriæ per quod per legem Angliæ bona & catalla quæ fuer. præd. Roberti tempore mortis suæ in manibus cujuscunq; administratoris aut administratricis bonorum & catallorum illorum administrand. existen' de debito & dampnis præd penitus exonerat. devenerunt prout eadem Anna viis & modis quibus convenit parat. est edocere præd' tamen Lucas machinans & intendens ipsam Annam pretextu Judicii præd. minus rite prægravare ac magnopere dampnificare alias post mortem ipsius Roberti scilicet Termino Sanct' Trinitatis Anno Regni nostri & Dominae Mariæ nuper Reginae Angliæ &c. quinto prosecut. fuit extra præd. Curiam coram nobis & Dna' Maria nuper Regina nostra apud Westm. quoddam Breve nostrum & præd. Mariæ nuper Reginae nostr. de Scire fac.

de & sup Judicio pd. versus præd. Annam Administratricem bonorum & catallorum præd. Roberti præd. tunc Vic. London direct. per quod quidem Breve recitando qd' cum præd' Lucas nuper in Curia dicti nuper Regis Caroli secundi coram ipso nuper Rege apud Westm' per billam sine brevi dicti nuper Regis ac per Judicium ejusdem Curia recuperasset versus præd. Edmundum Craister alias dict. Edmund Craister de Craister in Com. præd' Armig. & præd. Robertum Lampton alias dict. Robertum Lampton de Newham in Com. præd. Gen. præd' quadringent. libras de debito necnon præd' quadraginta solidos pro dampnis suis quæ sustinuit tam occasione detentionis debiti illius quam pro mis. & custagiis suis per ipsum circa sectam suam in ea parte apposit. unde tunc convict. fuer. sicut constabat de Recotdo recitando etiam & suggerendo quod præd' Edmundus secundo die Julii Anno Regni Domini Jacobi secundi nuper Regis Angliæ, &c. quarto apud London in Parochia beatae Mariæ de Arcubus in Warda de Cheape obiit & quod præd. Robertus ipsum supervixit qdq; postea præd' Robert. primo die April. Ann. Regni nostri & præd. nuper Reginae nostræ secundo apud London' pd' in parochia & warda præd. obiit intestat. & quod post ejus

Scire facias sued out against the Administrator of the deceased.

R r 2

mor-

mortem administratio omnium & singulorum bonorum & cattallorum jur' & creditorum quæ fuer. præd. Roberti tempore mortis suæ præfat. Annæ Lampton commissa fuit (debito & dampnis præd præfat. Lucæ minime satisfact) quodq; præd. Lucas nobis & præd. nuper Regina nostræ supplicasset sibi de remedio congruo in ea parte provideri nosq; & p'd nuper Regina nostra in ea parte fieri volentes qd. fuit justum per idem breve dict. Vicecomitibus London præcepimus quod per probos & legales homines de Balliva sua scire facerent præfat' Annæ qd. esset coram nobis & præd' nuper Regina nostra apud Westm. præd' die Martis prox. post Quinden. Sanct. Trinitatis tunc prox. sequen' ad ostendend' si quid pro se habuit vel dicere scivit quare præd. Lucas executionem suam de debito & dampnis præd' de bonis & cattallis quæ fuer. præd' Roberti tempore mortis suæ in manibus ipsius Annæ administrand. habere non debuit si sibi videtur expediri & ulterius factur. & receptur. qd' præd. Curia tunc coram nobis & præd' nuper Regina nostra de eo adtunc & ibidem consideraret in ea parte & quod haberent ibi tunc nomina eorum per quos ei scire facerent & breve illud &c. ad quem diem in ead. Cur. coram nobis & præd. nuper Regina nostra apud Westm. ven' præd. Lucas

in propria persona sua & Vic. London. præd videlt. Thomas Lane Mil. & Tho. Cook Mil. nobis & præd. nuper Regina nostræ adtunc retorn. super breve præd. quod præd. Anna nichil habuit in Balliva sua ubi aut per quod ei scire facere potuer. nec fuit invent. in eadem & eadem Anna non ven' Ideo sicut prius per eandem Curiam adtunc præcept. fuit eisdem Vicecomitibus London quod per probos & legales homines de Balliva sua scire facerent præfat. Annæ quod esset coram nobis & præd. nuper Regina nostra apud Westm. die Martis px. post tres septimanas Sanctæ Trinitatis tunc prox. sequen. ad ostendend. in forma præd. si &c. Et ulterius &c. idē dies dat. fuit per eandem Curiam tunc coram nobis & præd. nuper Regina nostra præfat. Lucæ ibidem &c. Ad quem diem in præd. Curia coram nobis & præd. nuper Regina nostra apud Westm' venit præd. Lucas in propria persona sua & Vicecomites London' præd. sicut prius retorn. quod præd. Anna nichil habuit in Balliva sua ubi seu per qd' ei scire facere potuer' nec fuit invent. in eadem & præd. Anna licet ad eundem diem solempniter exact. non venit sed defaultam fecit Ideo adtunc & ibidem conf. fuit per eandem Curiam coram nobis & præfat. nuper Regina quod prædict Lucas haberet executi-

The Sheriffs return Nichil.

Alias scire facias.

The Sheriffs return Nichil.

Executi-
on ad-
judged up-
on the
Scire fa-
cias by
Default.

cutionem de debito & damp-
nis prædict. de bonis & ca-
tallis quæ fuer. præd Roberti
tempore mortis suæ in manibus
ipsius Annæ administrand. pro-
ut per Recordum & processum
inde in Curia nostra coram no-
bis apud Westm' præd. residen'
plenius apparet Idemq Lucas
executionem versus ipsam An-
nam de debito & dampnis præ-
dict. de bonis & catallis præd.
levand. licet eadem Anna nun-
quam summonita fuit in præd.
placito de Scire fac. ad osten-
dend. causam quare dictus Lu-
cas executionem hujusmodi
versus eam habere non deberet
nec in placito illo comperuit
licet etiam eadem Anna bona
& catalla illa ex causa præd.
inde de jure exonerari non de-
beat psequi pponit & minatur
in ipsius Annæ dampnum non
modicum & gravamen ac con-
tra legem & cons. Regni nostri
Angliæ unde eadem Anna no-
bis supplicavit de remedio con-
gruo sibi per nos in hac parte
provideri nos nolentes eidem
Annæ aliquantulum injuriari
volentesque fieri in hac parte
quod est justum vobis manda-
mus quod Audita Querela
præd. Annæ vocatisque coram
vobis partibus præd. & aliis
quæ in hac parte fore videritis
evocand. auditisq; hinc inde
eorum rationibus partibus præ-
dict' plenam & celerem Justiti-
am fieri fac. prout de jure &
secundum legem & consuetudi-

nem Regni nostri Angliæ fuerit
faciend. Teste meipso apud
Westm. 23. die Januarii Anno
Regni nostri sexto.

Blumpton.

Postea scilicet die Mercurii
prox. post Quinden. Sancti Hil-
larii isto eodem Termino co-
ram Domino Rege apud West-
monast. venit præd. Anna Lam-
pton per Nicholaum Harding
Attorn. suum & statim dicit
quod præd. Lucas execution.
versus ipsam Annam de debito
& dampnis præd' de bonis &
catallis quæ fuer. præd. Rober-
ti Lampton tempore mortis
suæ in manibus ipsius Annæ le-
vand. habere non debet quia
dicit quod prædictus Lucas
Collingwood nuper scilt. Ter-
mino Paschæ Anno Regni dicti
nuper Regis Caroli secundi 34.

*The De-
claration
upon the
Writ.*

supradicto in Curia ejusdem
nuper Regis coram ipso nunc
Rege apud Westm. in Com.
Middlesex prædict. per judici-
um ejusdem Curie recuperas-
set versus præfat' Robertum
Lampton & præd. Edmundum
Craister per nomina E. C. & c.
præd' quadringent. libras de
debito necnon præd. quadra-
ginta solidos qui eidem Luce
in eadem Curia adjudicat fuer.
pro dampnis suis quæ sustinuit
tam occasione detentionis de-
biti illius quam pro misis & cu-
stagiis suis per ipsum circa se-
ctam suam in ea parte apposit.
unde convict. fuit prout per
Re-

*The Reco-
very of the
Judg-
ment in
the King's
Bench.*

Altho' the
Admini-
strator
was ne-
ver sum-
moned to
shew
cause, nor
did ever
appear.
The
Plaintiff's
grava-
men.

Audita
Querela.

*One of
the De-
fendants
dies.*

*Scire fac.
sued out
against the
Admini-
strator of
the De-
ceased.*

Recordum & Processum inde in Curia dicti Domini Regis nunc coram ipso Rege apud Westm. præd. residen. plenius apparet & eadem Anna ulterius dicit quod postea præd. Robertus in vita præd. Edmundi scilicet primodie Novembris Anno Regni dicti nuper Regis Jacobi secundi primo supradicti Obiit & idem Edmundus ipsum Robertum supervixit videlicet apud Morpeth præd' in Com. Northumbriae præd. per quod per legem Angliae bona & catalla quæ fuer. præd. Roberti tempore mortis suæ in manibus cujuscunq; Administratoris vel Administratricis bonorum & catallorum ill. administrand' & existen' de debito & dampnis præd' penitus exonerat. devener. prout eadem Anna viis & modis quibus convenit parat. est edocere præd. tamen Lucas machinan' & intenden' ipsam Annam prætextu judicii præd. minus rite prægravare ac magnopere dampnificare alias post mortem prædicti Roberti sciit. Termino Sanctæ Trinitatis Anno Regni Domini Willielmi nunc Regis Angl' &c. & Dominae Mariæ nuper Reginae Angl. &c. quinto prosecut. fuit extra præd. Curiam tunc coram dicto Domino Rege nunc & dicta Maria nuper Regina apud Westm' præd' Breve dicti Domini Regis nunc & dictæ nuper Reginae tunc de Scire fac. de & super judicio

præd' versus ipsam præfat. Annam Administratricem bonorum & catallorum præd. Roberti præd. tunc Vicecomitibus London direct. per quod quidem Breve recitando qd' cum prædict' Lucas nuper in Curia dicti nuper Regis Caroli secundi coram ipso nuper Rege apud Westm. per billam sine breve dicti nuper Regis ac per judicium ejusdem Curia recuperasset versus præd. Edmundum Craister alias dict. Edmond. Craister de Craister in Com. præd' Armig. & præd. Robertum Lampton alias dict' Roberium Lampton de Newham in Com. præd' Gen' præd' quadringent. libras de debito necnon præd' quadraginta solidos pro dampnis suis quæ sustinuit tam occasione detentionis debiti illius quam promissis & custagiis suis per ipsum circa sectam suam in ea parte appoit. unde tunc convict. fuer' sicut constabat de recordo recitando etiam & suggerendo qd' præd. Edmundus secundo die Julii Anno Regni Dom. Jacobi secundi nuper Regis Angl' &c. quarto supradict' apud London' præd. in præd. parochia beatæ Mariæ de Arcubus in Warda de Cheap obiit & quod præd. Robertus ipsum Edmundum supervixit quodq; postea præd. Robertus primo die Aprilis Anno Regni dicti Domini Willielmi nunc Regis & Dominae Mariæ nuper Reginae Angliae se-

secundo supradict. apud London præd. in parochia & warda præd. obiit intestat. & quod post ejus mortem administratio omnium & singulorum bonorum & catallorum jur. & creditorum quæ fuer. præd. Roberti tempore mortis suæ præfat. Annæ Lampton commissa fuit (debito & dampnis præd. Lucæ minime satisfact.) quodq; præd. Lucas præd. Domino Wilhelmo nunc Regi & Dominæ Mariæ nuper Regina Angliæ supplicasset sibi de remedio congruo in ea parte provideri & quod dict. Dominus Rex nunc & dicta nuper Regina in ea parte tunc fieri volen. quod fuit iustum per idem breve dictis Vicecomitibus London præceperunt quod per probos & legales homines de Balliva sua scire fac. præfat. Annæ quod esset coram dicto Domino Rege nunc & dicta nuper Regina apud Westm. præd. die Martis prox. post Quinden. Sanctæ Trinitatis tunc prox. sequen. ad ostend. si quid pro se habuit vel dicere scivit quare prædict. Lucas executionem suam de debito & dampnis præd. de bonis & catallis quæ fuer. prædict. Roberti tempore mortis suæ in manibus ipsius Annæ administrand. habere non debuit si sibi viderit expediri & ulterius factur. & receptur. quod præd. Cur. coram dicto Dom. Rege nunc & dicta nuper Regina de eo ad tunc & ibi-

dem consideraret in ea parte Et qd. haberent ibi tunc nomina eorum per quos ei scire facerent & breve ill. &c. ad quem diem in eadem Cur. coram dicto Domino Rege nunc & dicta nuper Regina apud Westm. ven. præd. Lucas in propria persona sua & Vic. London. prædict. videlt. Thomas Lane Mil' & Thomas Cook Mil' dicto Domino Regi nunc & dicta nuper Regina ad tunc Retorn' super brevi ill. quod præd. Anna nichil habuit in Balliva sua ubi aut per quod ei scire facere potuer. nec fuit invent. in eadem Et quod eadem Anna non venit lo. sicut prius per eandem Cur. ad tunc præcept. fuit eisdem Vic. London' quod per probos & legales homines de Balliva sua scire facerent præfat. Annæ quod esset coram dicto Domino Rege nunc & dicta nuper Regina apud Westm. die Martis prox. post tres Septimanas Sanctæ Trinitatis tunc prox. sequen' ad ostend. in forma præd. si &c. Et ulterius &c. idem dies dat. est per eandem Cur. tunc coram dicto Domino Rege nunc & dicta nuper Regina præfat. Lucæ ibidem &c. Ad quem diem in præd. Cur. coram dicto Dom. Rege nunc & dicta nuper Regina apud Westm. ven. præd. Lucas in propria persona sua Et Vic. London præd. sicut prius retorm. quod præd. Anna nichil habuit in Balliva sua ubi aut per

per quod ei scire facere potuer. nec fuit invent. in eadem & præd. Anna licet ad eundem diem solempnit. exact. non ven. sed default. fec. lo' ad tunc & ibidem conf. fuit per eandem Cur. coram dicto Domino Rege nunc & dicta nuper Regina quod præd' Lucas haberet executionem de debito & dampnis præd. de bonis & catallis quæ fuer. præd. Roberti tempore mortis suæ in manibus ipsius Annæ administrand. prout per Recordum & Processum inde in Curia præd. Domini Regis nunc coram ipso Rege apud Westm. residen. plenius apparet idemq; Lucas executionem versus ipsam Annam de debito & dampnis predict. de bonis & catallis predict. levand. licet eadem Anna nunquam summonita fuit in præd. placito de Scire fac' ad ostendend' causam quare dictus Lucas executionem huiusmodi versus eam habere non deberet nec in placito illo comperuit, licet etiam eadem Anna & bona & catalla illa ex causa præd' inde de jure exonerari debent prosequi proponit & minatur in ipsius Annæ dampnum non modicum & gravamen ac contra legem & conf. huius Regni Angliæ Et hoc eadem Anna parat. est verificare unde petit iudicium & qd' præd. Lucas ab omni executione quacunq; de & super recuperatione præd. de bonis & catallis quæ fuer.

The Defendant summoned to show Cause why she should not be Execution against her. The Plaintiff's gravamen.

Petit Iudicium.

præd. Roberti tempore mortis suæ levand' habend' precludatur &c. & quod eadem Anna ad omnia quæ ipsa occasione adjudication. executionis præd. amisit restituatur &c. Et quod præd. Lucas ven. hic in Curia de & super præmissis responsur' &c. sed quia Curia Domini Regis nunc hic coram ipso Rege incognit. existit utrum allegation. præfat. Annæ in hac parte sint veræ necne Ideo præcept. est Vicecomiti Northumbriæ præd' quod venire fac. coram Dno' Rege a die Paschæ in quindecim dies ubicunque &c. præd. Lucam de & super præmissis responsur' ulteriusq; factur. & receprur. quod Curia dicti Domini Regis nunc hic coram ipso Rege de eo conf. in hac parte idem dies dat' est præfat. Annæ &c. Ad quem diem coram Domino Rege apud Westm. ven. præd' Anna per Attorn. suum præd. & præd. Lucas ad eundem diem solempniter exact. per Henricum Dodd Attorn. suum filit. ven. & dicit quod materia in brevi & narratione præd. content' minus sufficien' in lege existit ad præd' Lucam ad eandem respondere compellend. aut ad executionem suam de & super iudicio præd. de bonis & catallis quæ fuer. præd. Roberti Lampton tempore mortis suæ levand' habend' retardand ad quam idem Lucas necesse non habet nec per legem terræ tenetur

and Restitution.

A Venire facias awarded.

The Defendant appears thereupon.

And demurs.

netur aliquo modo respondere & hoc parat. est verificare unde pro defectu sufficien. brevis & narrationis in hac parte idem Lucas petit Judicium de brevi & narratione illa & quod breve & narratio illa cassentur &c.

Cres. Levinz.

*Foynder
in De-
murrer.*

Et præd. Anna dicit quod breve & narratio præd. cassari non debent quia dicit quod Breve & narratio ill. materiaq; in ill. content. bon. & sufficien. in lege existunt ad præd. Lucam ab executione sua de & super Judicio præd. versus ipsam Annam de bonis & catallis quæ fuere præd. Roberti tempore mortis suæ levand. hend. præcludend. quæ quidem breve & narration. materiamq; in ill. content. eadem Anna parat. est verificare & probare prout Curia &c. Et quia præd. Lucas ad Breve & narrationem prædict. non respond. nec ill. hucusque aliquammodo dedit eadem Anna ut prius pet. Judicium & quod prædict. Lucas ab omni executione quacunque de & super recuperation. prædict. de bonis & catallis quæ fuer. prædict. Roberti tempore mortis suæ levand. hend. præcludatur &c. & quod ipsa ad omnia quæ ipsa occasione adjudicationis executionis prædict. amisit restituatur &c. sed quia Curia Domini Regis hic de judicio

suo de & super præmissis reddendo nondum advisatur dies inde dat. est partibus præd.

*Continu-
ance-*

coram Domino Rege a die Sanctæ Trinitatis usque in tres Septimanas ubicunq; &c. de judicio suo de & super præmissis audiend. eo quod Curia dicti Domini Regis hic inde nondum &c. ad quem diem coram Domino Rege apud Westm. ven. partes præd. per Attornatos suos prædict. super quo vicis & per Cur. Domini Regis nunc hic pleniùs intellectis omnibus & singulis præmissis maturaq; deliberatione inde habitat pro eo quod videtur Cur. dicti Dom. Regis nunc hic quod breve & narratio præd. materiaq; in ill. content. bon. & sufficien. in lege existunt ad præd. Lucam ab executione sua de & super judicio præd. versus præfat. Annam de bonis & catallis quæ fuer. præd. Roberti tempore mortis suæ levand. habend. præcludend. Ideo conf. est quod prædictus Lucas ab omni executione quacunque de & super recuperatione præd. de bonis & catallis quæ fuer. præd. Roberti tempore mortis suæ levand. habend præcludatur &c. Et quod ipsa eadem Anna ad omnia quæ ipsa occasione adjudication. execution. prædict. amisit restituatur, &c.

*Judg-
ment for
the Plain-
tiff.*

Lampton *versus* Collingwood.

The Case.

1 Salk. 262.

Judgment was obtained against two Persons who are both dead, the Creditor brought a Scire fac. upon that Judgment against the Administratrix of one of them, and after two Nichils returned Judgment was awarded against her by Default.

Afterwards she brought a Writ of Error, coram vobis residens. and the Error in fact assigned was, That she was never summoned.

And the Question was, Whether this Writ of Error would lie or not? because the two Nichils returned amount to a Scire feci; and so there being a Judgment by Default after two Nichils, 'tis too late now to bring a Writ of Error.

4 Leon. 24.
36.
placit. 76.
99.Cro. Eliz.
730.* 27 Eliz.
cap. 8.

Some Cases were cited to prove that Error would lie after a Judgment in Scire fac. viz. where Judgment was had against the Bail upon Scire fac. and yet they brought a Writ of Error, there being no Capias against the Principal, which being Error in Process, it was held that the Writ would lie: In Mich. Term, 41 Eliz. the same Error was assigned by the Bail after Judgment against them in a Scire fac. upon two Nichils returned, as in the Case at Bar; and it was then objected, That a Writ of Error would not lie, not for the Reason above-mentioned, but because such Writ is given by the Statute to the Parties only in the Action, and not to the Bail; but it was held that a Suit upon a Scire fac. is in Nature of an Action of Debt, and a Judgment in Debt is particularly mentioned in the Statute, and therefore a Writ of Error would lie.

Cro. Car.
481.

The like Error was assigned in Hillary Term, 12 Car. 1. but there was also Error assigned by the Bail in the principal Judgment, which being coupled with the Error in the Judgment on the Scire fac. two Judges held the Writ should abate, because the Bail cannot have Error for an Error in the principal Judgment; but it was agreed by all that it would lie upon the Judgment on a Scire fac.

Style 323.
1 Roll. Abr.
309.

But the latter Cases seem to be otherwise, viz. That a Judgment upon two Nichils returned, is a Judgment by Default after Notice, and therefore a Writ of Error comes too late to reverse such Judgment; this is the Case of Bar-

cock

cock and Tompson reported by Style, and is mentioned also by my Ld. Rolle, and agreed by him that such Judgment is not erroneous; and upon the Authority of this Case the Writ of Error was now quashed.

Afterwards the Administratrix of Lampton brought an Audita Querela, suggesting also therein that she was never summoned, and that her Husband died in the Life-time of the other Debtor, and so his Estate was thereby discharged of the Debt; and upon a Demurrer it was debated.

First, Whether an Audita querela would lie, because where the Party might have any other Remedy, that Writ will not lie?

Now 'tis plain, That if the Administratrix had not suffered Judgment against her by Default in the Scire fac. she might have pleaded this Matter; but by her Neglect therein she cannot now have an Audita Querela.

But the Court were of a contrary Opinion upon the Authority of Barcock and Thompson's Case abovementioned, that the Administratrix shall have an Audita Querela, because now she hath no other Remedy.

Then the Question was, Whether the Administratrix of the Person first dying, shall be charged with the Executors of the Survivor?

Serj. Levinz argued That both shall be charged, because where Judgment has been obtained against two in an Assize of Novel Disseisin, and upon a Scire fac. to have Execution of the Damages the Sheriff returned, That one was dead, and that he had summoned the Survivor; and it was held that he should not be compelled to plead before the Heir and Certenants of the dead Man were summoned.

Fitz. Abr.
tit. Executi-
on. pl. 81.

So where Judgment was had against two in an Action on the Case, and a Writ of Error brought, and one died pending the Writ, it was abated, because what was several before the Judgment was thereby made joint, and the Plaintiff in the Judgment must have a Scire fac. against the Executors of the dead Man who are now become charged with that Judgment, and it shall not survive to the other alone.

Yel. 208;
209.

But on the other Side it was argued, That where the Lands of several are charged with a Debt, it shall not lie wholly upon the Survivor; as, if a Recognizance is acknowledged by several, the Lands of all are thereby become chargeable, and Execution shall be equally made; and if one should die, the Creditor must bring a Scire fac. against his Heir and Certenants; for they being all in equali jure, the Charge doth not survive; but 'tis otherwise where

Sir William
Herbert's
Case, 3 Rep.
12.
1 Lev. 30
Raym. 26

¹ Sid. 238. the Lands are not bound by Judgment; as if two enter into a Bond, and one dies before Judgment, the Survivor shall be charged alone: And Judgment was given accordingly.

Moor *versus* Parker.

Mich. 4 Will. Rot. 268.

A Sumpleit upon a Wager being a feigned Issue directed by the House of Peers, the Case upon a special Verdict found was thus, viz.

George Chute the Father being seized of the Lands in Question made a Settlement thereof to George his Son for Life, Remainder to his first, &c. Son in Tail-male, Reversion in Fee to George the Father, who in June 1683. made his Will as followeth, viz.

As touching my Lands and Tenements, &c. my Will is, That if my Son's Wife die during the Life of her Husband without Issue Male, that then he shall have Power to make a Jointure to any other Wife, AND FOR WANT OF ISSUE MALE of his said Son, then the Lands shall be and remain to his Son by any other Wife, and his Granddaughter shall have 4000 l. AND IN CASE OF FAILURE OF ISSUE MALE by his Son George, then all his Lands shall go to his Grandchildren and their Heirs, share and share alike.

George the Father died, his Son survived and suffered a Common Recovery, and died without Issue Male.

The Question was, Whether those who claimed under the Recovery, or the Grandchildren of the Testator had the better Title, that is, whether George the Son had only an Estate for Life or in Tail?

Serj. Levinz argued, that the Son had an Estate-tail, and that by the Recovery the Estate to the Granddaughters was barred.

That it was an Estate-tail by Implication, and it could not be otherwise, because the Son could not have a fee-simple, for that was devised to the Granddaughters upon his dying without Issue Male, and therefore not having the fee, he must of Necessity have the Estate-tail in the mean Time by the last Clause of the Will.

There is nothing devised to him by express Words, but by Implication; and 'tis no new Thing that an Estate-tail should arise by Implication especially in a Will; as for example,

In

In Michaelmas Term 9 Jac. the Case upon a special Verdict was, viz. William Brown had Issue John and two Daughters, and he had likewise two Nephews, Matthew and Henry, and having Lands in several Places, he devised all to his Son and his Heirs; and if he died without Issue then he gave his Land in one Place to Matthew in fee, Item, I devise my Land in *White-acre* to Henry and his Heirs; it was adjudged, That this was a Limitation by way of Remainder to Henry, and that the Words shall be construed thus: viz. That Henry shall have the Fee if John die without Issue.

2 Cro 290.
Brown ver-
sus Jerves.
Yel. 209.

Now tho' there was an express Devise of the Fee in that Case, which is not in the Case at Bar, to the Son, yet that will make no Alteration, because the Son would have been entitled to a Fee-simple by Descent had it not been for the Will,

So in Trinity Term 14 Jacobi, the Case was, a Man had a Wife, one Son and two Daughters, and devised his House in London to his Son after the Decease of his Mother, And if his three Sisters survive their Brother and his Heirs, that then they shall have it for their Lives, Remainder over, &c. it was held, That the Son had an Estate-tail, because the Word Heirs there shall be intended Heirs of his Body, otherwise the Limitation to the Sisters would be void, because then a Fee would be limited upon a Fee, which is against the Rules of Law: Now in this Case there was no express Devise of any Estate to the Son, and yet it was adjudged that he had an Estate-tail by Implication.

2 Cro 415.
Webb ver-
sus Herring.
1 Roll. Abr.
836.
pl. 5 & 6.

'Tis true, in the Case of Pell and Brown there is a contrary Resolution, that was a Devise to T. his youngest Son and his Heirs, and if he died without Issue living W. his eldest Brother, that then he should have it in fee; this was adjudged an Estate in fee in T. and no Tail, the Reason given was, because W. had only a Possibility of having it, for it was not devised to him absolutely, viz. if T. died without Issue: but upon a Contingency, viz. his dying with Issue living W.

2 Cro. 590.
1 Roll. Abr.
835.

The Serjeant did not answer this Case, only said, That he had heard very learned Judges affirm that it was a very hard Case.

Then he argued, That if the Daughters had any Title, it must be by way of Contingent Remainder or of an Executory Devise.

It cannot be the one, because the Son had no Estate of Freehold to support such Remainder.

Neither

Neither can it be the other, because an Executory Devise is never to arise upon failure of Issue Male generally, or without Issue indefinitely, and in this Case there is an Estate-tail which may last many Generations.

Sir Bartholomew Shower, contra.

By the Settlement George the Son had but an Estate for Life, and he shall not have an Estate-tail by Implication by this Will, because the Design of it was only to enable him to make a Jointure to any other Wife, and to provide for her Children, but not to enlarge his Estate.

1 Roll. Abr.
837.
pl. 13.

The Words which seem to create an Estate-tail are, viz. And for want of Issue, &c. but the Law is otherwise, because there is no express Estate given to him by the Will before those Words: 'Tis like the Case in Mich. 10 Jacobi, where a Man devised an Estate to his eldest Son for Life; Remainder to the Sons of his Body lawfully begotten, and if they alien, &c. that then his Daughters shall have the Land, Remainder to his right Heirs; it was held that the Words, viz. Sons of his Body, and first Son, &c. are Words of Purchase.

Neither can the Words, viz. In Case of failure of Issue Male, &c. create an Estate-tail, because those were added to explain what was generally and uncertainly expressed before.

1 And. 8.
Dyer 171.
Godb. 16.

In Mich. 1 Eliz. Clement Frensham devised Lands to his Wife for Life, Remainder to his Cousin, and the Heirs Male of his Body; and if his Cousin die without Issue of his Body (but doth not say Issue Male) Remainder over in fee, the Cousin had Issue a Daughter only and died; and it was adjudged, that she should not have the Land by these general Words; it was not an Estate-tail to him, and the Heirs of his Body in general, but to him and the Heirs Male of his Body, for the Will took Effect by the first Words which are a Guide to those which follow.

And there is no more Reason why these general Words in the Case at Bar should give an Estate-tail by Implication to George Chute the Son, there being no particular Estate devised to him before, than there was in the Case above-mentioned, why the general Words in that Case did not make any such Estate.

2 Cro. 199.

There is another Case to this Purpose, it was a Copyholder in fee, who made a Surrender to the Use of his Will, and then devised to his Wife, and if she had Issue by him, then to the Issue, &c. and if such Issue die before Age, or before his Wife; Or if she have no Issue, then, &c. it

it was held, that he had but an Estate for Life, and could not dispose the Lands to her Children.

And according to these Resolutions have late Cases been adjudged; as, where a Woman had two Sons by two Husbands, she devised to T. her eldest Son for Life, and to his Issue in Tail, and if he died without Issue then living, to her second Son in Fee; But if he die having Issue of his Body then living, then to him in Fee: It was held that tho' the Reversion descended to him as Heir, yet by the Limitation of the Will he had but an Estate for Life, which is like the present Case, viz. a good contingent Remainder to commence upon his dying without Issue Male. Sid. 47.

Curia. It will be impossible to make this an Estate-tail by tacking the Estate by the Will to the Estate for Life in the Settlement on Purpose to support the contingent Remainder; because the Settlement and Will are two distinct Conveyances; and therefore Judgment was given that this was not an Estate-tail.

Warrington *versus* Mosely.

Hill. 6 Willielmi, Rot. 291.

Error of a Judgment in the County-Palatine of Chester. 1 Mod. 231.
The Plaintiff prescribed for Toll of Goods bought 2 Mod. 244.
within a Manor, and the Question upon the Pleadings 2 Jones 118.
was, Whether such a Toll independent of all Markets and 3 Lev. 38.
fairs can be good?

It was argued that the Prescription was unreasonable,

- (1.) For the Manner, viz. The Lord only claims the Toll in his Manor, and it's not for Goods bought or sold in a Market, &c.
- (2.) For the Matter, viz' he prescribes to Toll of 2d. for every Pack bought in Manchester, called Manchester Wares, except of the Burghesses there.

All Toll must arise by Prescription or Grant, the one supposeth the other; now the Lord of a Manor cannot have Toll by Prescription, because at the Common Law there was no Custom paid but for Wooll, Woolfels, and Leather, 2 Inst. 49.
Vaug. 162.
which

which was therefore called *antiqua five magna custuma*, and all other Tolls are esteemed *Malæ Tolnetæ*.

Neither can he be entitled to this by any Grant from the King, because he cannot charge his People with any Thing but what is for the Publick Good, without their Assent in Parliament, and therefore the Writ of *ad quod dampnum* is directed to the Escheator to enquire what Damage it would be to the King, or any of his Subjects if he should grant to B. that he may make an Assignment of certain Lands to a Chaplain for ever to pray for his Soul in a certain Church, for by Reason of such Assignment the Land would be exempted from several Duties, as fines, Amerciaments, &c. *ita quod Patria per donationem & assignationem præd. magis solito non oneretur seu gravetur.*

Now if the King cannot impose a Duty upon his Subjects but such which is for their Benefit; a fortiori, a Lord of a Manor cannot; and to this Purpose there is an express Authority in Easter Term, 11 Car. viz. There was an Information against Morgan for levying 2d. for every Barrel landed at Cockernepill, tho' it was his own Land, and the Parties could not sell there without his Assent; yet this being to levy a new Toll, it was held unlawful; he might make a particular Agreement with the People, but he could not exact a Toll.

22 Aff. pl. 58.

Br. Abr. tit.

prescript. 88.

Title toll. 6.

Cro. Eliz.

710. contra.

2 Roll. Abr.

522.

2 Inst. 220.

1 Mod. 231.

Lit. Rep. 103.

This Toll is in Nature of Toll-through, for which there can be no Prescription, because 'tis lawful for any Man to pass by or through the Highway; so 'tis as lawful for any Man to buy Goods brought to his Shop.

If the Plaintiff had any Right to this Duty, he should have shewed that the People had some Benefit by selling their Goods in this Place; as. where a Man justifies in Trespass, and prescribes to have a Toll for Beasts driven over such a Manor; 'tis a void Prescription, being for Toll-through, unless the Party who claims the Duty doth shew that the Subject hath some Advantage.

1 Mod. 47.

Sid. 454.

So where a Man alledges a Custom to have so much per Tun for all Goods passing on a River by such a Wharf: This is a Toll-through which the Law calls *Malum Tolnetum*, unless the Plaintiff sheweth, that the River was usually cleansed by him, or that he repaired the Banks, or that he hath done some Good for this Duty.

Sid. 218.

Nay, it has been held, That a Tax cannot be imposed on the Subject but by Parliament, tho' 'tis for their Benefit.

But

But admitting that the Plaintiff may prescribe for Toll of Goods bought within this Place, yet such a general prescription is not good to bind Strangers, no more than a Prescription to have a Heriot of every Stranger dying within such a Manor, which is void, because it cannot have a reasonable Commencement between the Lord and a Stranger, tho' it may between him and his Tenants.

So a Prescription to have a Heriot (viz.) the best Beast of his Tenant, and if it be esloigned before the Lord seizes it, that then he may take the Beast of any other Person Levant and Couchant upon the Land; this is a void and an unreasonable Prescription. Dyer 199 b.

(2.) This is not good by Reason of the Uncertainty of the Thing out of which the Duty doth arise; for 'tis de qualibet sarcina, not saying of what it consists: Now if the Court must judge whether 2d. is a reasonable Duty or not, they must know what is in the Pack; and what a Customary Pack of Manchester Wares is, will be difficult to be known in Westminster-Hall.

To instance in parallel Cases, viz. many Indictments and Informations have been quashed for such Uncertainties, viz.

An Information for engrossing diversos cumulos tritici, was held void, because of the Uncertainty of the Quantity in each Heap, tho' the Value of the whole was particularly set forth. 1 Roll. Abt. p. 134.

So an Indictment for engrossing magnam quantitatem straminis & sceni was quash'd for the like Reason. Cro. Car. 318.

Likewise in Trover and Conversion pro duobus garbis Anglice Shrabes of Corn, the Declaration was held ill, because the Plaintiff had not shewed what Corn it was, and the Anglice being void, then it was only Trover de duobus garbis which Word in its Latitude comprehends any Thing which may be tied up in Bundles. March, 60. Aleyn 80,

This Prescription is also void by Reason of the Persons of whom 'tis demanded, viz. of all People bringing Wares thither to be sold, &c. so that neither the King himself nor his Purveyors are excepted; 'tis contrary also to Magna Charta, which enacts, That all Merchants may buy and sell without any manner of evil Tolls. Cap. 30.

'Tis void likewise by Reason of the Time demanded, viz. immediately upon the Sale of each pack of Wares: Now no Toll is due before the Sale, unless by Custom time out of Mind, and here is no Consideration laid why the Lord should have such a Duty. 2 Inst. 220.

It was argued on the other Side, that Time and Usage were the Foundations both of Prescriptions and Customs; and if Customs were not unreasonable it was not necessary to shew their Commencement.

As to the Generality alledged against this Prescription, 'tis not bold for that Reason, for such general Prescriptions to have Coll of all People, have been warranted by several Precedents.

1 Bullst. 195.

In Anno 10 Jacobi the Issue in a Quo Warranto was, whether the Defendant had Coll of all People within the Manor of Petworth in the County of Sussex, as well of the Tenants of the Earl of Arundel as of Strangers? And the Issue was found for him.

1 Leon. placito 195.

1 Roll. Abr.

559.

8 Rep. 115. b.

Cro. Eliz.

203.

Nothing is more common in our Books than for a Lord of a Manor to prescribe for a Duty within the same, tho' 'tis to the Prejudice of particular People, because such Customs may have a reasonable Commencement; and therefore it has been held for a Lord, &c. to prescribe that the Bread for all the Inhabitants in his Manor and Passengers there should be baked at his Oven, and that no other Person time out of Mind, &c. had used a Bake-house there without his Appointment, &c.

F. N. B. 153.

M. Reg 105.

b.

'Tis for this Purpose that the Writ de secta ad molendinum doth lie, and in the Register there is a Prescription alledged, Ratione Dominii, which is a very extraordinary Claim, and goes farther than what was made by the Lord of a Manor.

In 8 Ed. 3. 37. b. The Defendant justified in Trespass for pulling down of a fold, as Servants to the Lady of the Manor of Hastings, who by Reason of her Seigniorie had a freehold throughout the said Mill, so that no other could fold there without her Leabe; this extends as well to Strangers as to those of that Mill, and yet it was held good.

Br. Abr. tit.

prescription

placito 92;

Cro. Eliz.

710.

So in 21 H. 7. 16 a. The Mayor and Commonalty of Gloucester prescribed to have Coll of every Boat which passed by their City, &c. and this was adjudged a good Prescription, altho' no Reason is given why they should have that Coll.

Dyer 352. b.

Many other Cases might be cited wherein the Law was held to be the same, as in 18 Eliz. the Lord Mayor of London brought an Action on the Case, grounded upon a Custom to have the 20th Part of the Salt of every Stranger who brought it to the Port of London, and there is no Reason alledged why he should have that part, and yet the Mayor had Judgment.

In an Action on the Case the Defendant justified the taking of the Goods, for that the Bailiff of Yarmouth had used to have Coll of the Tenants and Inhabitants of Larkoff for any of their Goods brought thither by Sea to be sold; and upon a Demurrer he had Judgment, tho' it was upon a general Claim of Coll for all their Goods brought thither, without saying to the Port.

Cro. Eliz.
227
1 Leon. 231.

So in Trespass the Defendant prescribed to have 2 d. for every Score of Sheep of Strangers brought or driven per & trans villam de Melton Mowbray, and if that Coll was denied, to distrain for it; now tho' this was a Coll-thorough for which a Prescription cannot be alledged without shewing some Cause, that it may appear to have a reasonable Commencement, yet the Plea was held good by the Opinion of two Justices against Justice Popham, viz. That such a Coll might be claimed generally; for it being by Prescription, it cannot be intended that the Cause should be known why it began.

Cro. Eliz.
711.

The Person who gathers the Coll is a standing Witness of the Alteration of the Property, and of the Fairness of the Contract.

Then as to the other Objection, That 'tis unreasonable for the Incertainty; 'tis a Customary Claim for a certain Thing in a certain Place, and the Custom hath fixed what is meant there by the word Sarcina; 'tis as certain as a Duty for a Piece of Cloath in the Book of Rates; and 'tis as certain as a Prescription to have a Halfpenny for every Porter's Burden laid upon Queenhithe to be conveyed from thence by Water, which hath been held good; and 'tis very well known that a strong Porter will carry more Goods than another.

Hob. 85.
Moor
fol. 825.
pl. 1124.

Curia. Not satisfied with this Prescription, because there was no Recompence for it, and every Prescription to charge the Subject with a Duty, must impart a Benefit or Recompence to him, or else some Reason must be shewed why a Duty is claimed.

The Case in Dyer seems to be very hard, for the Lord Mayor to have the 20th part of all Salt brought to London, and no Reason given why he should have it.

But as for the Case of Foldage, it was upon the Lands held of the Manor of Hastings, whereof the Tenants had the Feedings, and that may have a reasonable Commencement.

Hicks *versus* Woodeson.

2 Salk.
655.
*Attach-
ment upon
a Prohibi-
tion.*

*Antiqua
parochia.*

*The Plain-
tiff an In-
habitant
and Land-
holder in
the Parish.*

*A Mo-
dus deci-
mandi
set forth.*

Somerset. ff. **N**icholaus Hicks qui tam pro Domino Rege & Domina Regina quam pro seipso in hac parte sequitur queritur de Samuele Woodeson Clerico Rectore Ecclesie parochial. de Huntspill in Com. Somerset. præd. in custod. Mar. Marefc. Domini Regis & Domine Regine coram ipsis Rege & Regina existen. de placito quære secut. est in Curia Christianitat. contra prohibitionem regiam ei prius inde in contrar. direct. & deliberat. pro eo videlt. quod cum parochia de Huntspill in Com. præd. est antiqua parochia Cumq; præd. Nich'us per spatium quinq; annorum jam ult. elaps. & amplius fuit & adhuc existit inhabitans infra paroch. præd. & per totam idem tempus quadraginta acras terræ prati & pasturæ cum pertin.. existen. parcell. manerii de Huntspill in dict. Com. Somerset. infra paroch. præd. finesq; limites & loca decimabilia ejusdem parochiæ habuisset & occupasset Cumq; etiam infra eandem parochiam finesq; limites & loca decimabilia ejusdem parochiæ habentur & a tempore cujus contrar. memoria hominum non existit habebantur tales consuetudines & modi deci-

mandi de & concernen' decimas agnorum infra parochiam præd. finesq; limites & loca decimabilia ejusdem parochiæ caden. part. & provenien. ac de & concernen. decimas vaccarum & juvenicarum mulgibilium infra paroch. præd. finesq; limites & loca decimabilia ejusdem parochiæ custodit. & depasturat. ac de & concernen' decimas vitulorum infra paroch. præd. finesq; limites & loca decimabilia ejusdem parochiæ caden. part. & provenien. ac de & concernen. decimas pullorum infra paroch. præd. finesq; limites & loca decimabilia ejusdem parochiæ caden. part. & provenien. ac de & concernen. decimas fœni infra paroch. præd. finesq; limites & loca decimabilia ejusdem parochiæ cresen. renovan. & provenien. ac de & concernen. decimas gardinorum & pomariorum infra paroch. finesque limites & loca decimabilia ejusdem parochiæ existen. ac de & concernen. solution. oblacon. omnium virorum & uxorum suarum infra paroch. ill. finesq; limites & loca decimabilia ejusd. paroch. inhabitant. videlt. quod quilibet occupator aliquarum terrarum sive ten'torum infra paroch. ill. finesq; limites & loca decimabilia ejusdem

*For
Lambs.*

*Milch
Cows.*

*And
Calves.*

*And
Calves.*

*And
Hay.*

*And
Gardens
or Or-
chards.*

*And Of-
ferings.*

*The Mo-
dus set
forth.*

eiusdem paroch. qui aliquam vaccam sive juvenecam mugibil' vel aliquas vaccas sive juvenecas mugibil' infra parochiam præd' finesq; limites & loca decimabilia inde in aliquo anno custodivit solvit & a toto tempore supradicto solvere usus fuit & consuevit Rectori Ecclesie paroch. de Huntspill præd' ejusve firmar. sive deputat. Rectorie illius pro tempore existen' pro qualibet huiusmodi vacca mugibil' tres denarios legalis monete Angliæ & pro qualibet huiusmodi juvenca mugibil' unum denarium & obolum similis legalis monete quolibet tali anno & non amplius pro omnibus decimis lactis earundem vaccarum & juvenearum eodem anno qdq; quilibet talis occupator ut præfertur qui in aliquo anno aliquem agnum vel aliquos agnos sub numero septem agnorum infra paroch' ill' finesque limites & loca decimabilia inde part. & provenien' habuit solvit & a toto tempore suprad. solvere usus fuit & consuevit Rectori Ecclesie parochial. de Huntspill præd. ejusve Firmar. sive Deputat. Rectorie ill. pro tempore existen' eodẽ anno unum obolum talis legal. monet. pro quolibet tali agno sic sub numero septẽ agnorũ part. & provenien' in plena satisfactione solution' & contentacon' omnium decimarum agnorum ill. sed si idem occupator in aliquo

huiusmodi Anno infra paroch. præd. finesq; limites & loca decimabilia inde aliquos agnos ad plenum numerum septem agnorum part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore supradict' reddere & deliberare usus fuit & consuevit Rectori Ecclesie parochial. de Huntspill præd. ejusve Firmar. sive Deputat. Rectorie illius pro tempore existen' unum agnum eorundem septem agnorum tali anno in plena satisfactione solutione & contentacon. & nomine & loco decimarum eorundem septem agnorum & pro numero septemdecim agnorum duos agnos & pro quolibet vitulo unum obolum si minus quam septem vitulis & si ultra septem tunc unum vitulum & duos vitulos pro septemdecim vitulis & unum denarium pro quolibet pullo & duos denar. p quolibet acra sceni & duos denar. p quolibet pomario & giardino & pro quolibet homine ætatis sexdecim annorum duos denar. & pro uxore duos denarios pro Oblationibus. Cumque Hundred' de Huntspill & Puriton infra prædict' Com' Somerset est & a tempore cujus contrar. memoria hominum non existit fuit antiquum Hundredum infra quod quidem Hundred' præd' paroch' de Huntspill est & a tempore cujus contrar' memoria hominum

Antiquum
Hundredum.

* Custom
for the
Inhabi-
tants
within a
Hun-
dred to be
discharg-
ed of Tithes
of Meadow
and Pa-
sture for
burren
Cattel.
Custom in
non deci-
mando
for all
Cattle
non mu-
gibil.
And not
employed
to the
Pail or
Plough.

The Plain-
tiff an In-
habitant
and
Land-
holder
within
the Hun-
dred.

And fed
Cattle
there.

num non existit fuit antiquum
hundred infra qd' quidem hun-
dred præd' paroch' de Huntspill
est & a tempore cujus contrar.
memoria hominum non existit
fuit * Cumq; infra idem Hun-
dred. de Huntspill & Puriton est
& a toto tempore suprad' fuit
quædam antiqua consuetudo a
toto tempore supradict' usitat.
& approbat' qd. omnes inhabi-
tantes infra Hundredum præ-
dict' aliquas terras prati sive
pasturæ infra Hundred' præd.
occupan' fuer liberi immunes
& exonerat. & de tempore in
tempus a toto tempore supra-
dicto liberi immunes & exo-
nerat. esse debuerunt de & a
solucon' aliquarum decimarum
de aut pro depasturacon. ali-
quorum averiorum minime
mulgibil. seu aratro usitat. An-
gl. not employed to plough
or pail per ipsos depasturat.
in aliquibus terris pratis seu pa-
sturis infra Hundred' de Hunt-
spill & Puriton præd. existen'
scilicet apud Hundred. præd.
Cumque prædict. Nicolaus
per spatium septem annorum
proximorum ante exhibicon'
billæ præfat Nicholai in Curia
hic fuit & adhuc est inhabitans
infra Hundred. præd. & infra
præd' paroch de Huntspill &
per totum idem tempus præd'
septem annorum possidebat &
occupabat diversas terras prati
& pasturæ infra Hundred' &
Paroch. prædict. & super eas-
dem terras prata & pasturas

& non alibi infra idem tempus
diversa averia minime mulgi-
bil. nec aratro usitat. Anglice
not employed to plough or
pail videlt' vaccas juvenecas &
pulos equorum depasturavit
pd' tamen Samuel pmiss non ig-
narus sed machinans & maliti-
ose intendens ipsum Nicholaum
contra debitam legis formam
& contra formam & effectum
dictorum modorum deciman-
di & consuetudinem prædict.
minus juste prægravare & op-
primere ac consuetudines &
præscriptiones modorum de-
cimandi ill' injuste violare
necnon dict. Dominum Re-
gem & Dominam Reginam
nunc & coronam suam exhære-
ditare & cognition' placiti quæ
ad dictum Dominum Regem
& Dominam Reginam coron'
& dignitat. suas regias spectat
& pertinet ad aliud examen
trahere ipsum Nicholaum co-
ram venerabili viro Richardo
Hely legum Doctore surrogat.
venerabilis viri Edwin Sandys
Clerici Archidiaconi Archidiac'
Wellen. legitime constitut' sur-
rogat' sive legitime deputat' dict'
Archidiaconat. aut al. iudice
in hac parte competen' quo-
cunq; de & pro subtraction' &
non solucon' decimarum magno-
rum infra paroch. ill finesque
limites & loca decimabilia in-
de caden' part. & provenien.
Annis Domini 1689, 1690. &c.
necnon mensibus Martii Apri-
lis Maii & Junii Anno Dom.

1693.

Prædict.
tamen
the De-
fendant
præmis-
sor. non
ignarus,
&c.

Trahit
in placi-
tum co-
ram the
Ecclesiastical
Judge.

For Non-
payment of
Tithes.

1692. jam curren. eorumve mensium & annorum quolibet uno sive aliquo ac de & pro subtractione & non solucon. decimarum vitulorum infra paroch. præd. finesq; limites & loca decimabilia inde (so for **Colts, Cows, Heifers, Hay, Gardens and Orchards** mutatis mutandis) per præd. Nicholaum Hicks possess. ac de & pro subtraction. & non solucon' oblacon' omnium virorum & uxorū suarum inhabitant. infra paroch. ill. finesq; limites & loca decimabilia inde annis & mensibus suprad. eorumve quolibet uno sive aliquo traxit in placitum caute & subdole libelland. in eadem Curia Christianitatis versus præfat. Nicholaum Hicks in & per quoddam libellum & quandam Schedulam eidem libello subscript. seu annex. versus eundem Nicholaum Hicks in eadem Curia Christianitat. exhibit' sub forma sequen videlicet Imprimis quod præfat' Magister Samuel Woodeson Annis Domini 1789, 1690. &c. videlicet elapsis mensibus in eisdem respectivè concurren. necnon mensibus Martii Aprilis &c. Anno Dni. 1693. jam curren. eorumve mensium & annorum quolibet uno sive aliquo fuit & erat Rector Ecclesiæ Paroch. de Huntspill præd' ac omnium & singularum decimarum jur. & emolument. Ecclesiasticorum ad eandem Recto-

toriam spectan. & pertinen. dictamq; Rectoriam cum suis jur. membris & pertinen. universis rite legitime canonice assecut. & adept. fuit ipsamq; sic assecut. cum suis jur. & pertinen. universis pacifice & quiete possedit & habuit prout in præsentī (salvis infra script.) possidet & habet proq; vero Rectore & legitimo possess. ejusd. fuit per tempus præd. ac etiam in præsentī est communiter dictus tent. habit. nominat' & reputat. palam publice & notorie ponit tamen, &c. ac ponit conjunctim & divisim de quolibet Item quod tam de jure communi hujus incliti Regni Angliæ quam ex antiqua & laudabili legitimaque præscript. consuetud' a tempore & per tempus cujus initii sive contrar. memoria hominum non existit hucusq; inviolabil. & inconculse usitat. & observat. ac in contradictor. judicio sapius seu saltem semel obtent' jus percipiend. recipiend. & habend. omnes & singulas decimas tam majores quam minores mixtas & minutas quascunq; cæteraq; jur. & emolumenta Ecclesiæ quæcunq; in Scheda præsentibus annex. contentum & specificat. infra Parochiam de Huntspill prædicta finesque limites & loca decimabilia ejusdem ubicunq; quodocunq; quomocunq; & quotiescunq; provenien. crescen. renovan. & contingen. ad Rector. ibidem quem-

quemcunq; pro tempore existen. ejusve firmar. & ad dictum Magistrum Sam. Woodeson Clericum Rectorem ibidem modernum spectavit & pertinuit spectat & pertinet sicque spectare & pertinere debuit debet & debebit in futur. ac ponit ut supra Item quod a decem vigint. trigint. quadragint. quinquagint. & sexaginta annis ult. elaps. ultra & citra necnon a tempore & per tempus cujus initii sive contrar. memoria hominū non existit Rector dictæ Rectoriæ Eccles. Paroch. de Huntspill præd. temporibus suis respectivis successive existen. dictusq; Magister Samuel Woodeson Clericus Rector ibidem modernus ejusve prædecessores & omnes & sing. prædecessores sui temporibus successivis in eadem existen. in eadem fuer. prout esse debuere in quietâ & pacifica possession. seu quasi juris percipiend. & habend. omnes & sing. decimas præd. easq; per se vel suos prædecessores receper. habuer. & de & super eisdem libere & plenar. disposuer. acq; sic fuit & esse debeat percepit recepit & habuit disposuit præfat. Magister Samuel Woodeson Clericus Rector. antedict. toto & omni tempore incumben. suæ in eadem jur. & nomine Rectoriæ suæ usq; ad & in tempus graminum infrascript. ac ponit ut supra Item præd. Nicholas Hicks annis &

mensibus supradictis eorumve uno sive aliquo omnes & singulas res decimabil. decimas fructus jur. & emolumenta in Sched. præsent. annex. content. & specificat. infra Paroch. de Huntspill præd. finesq; limites & loca decimabilia ejusdem provenien. crescen. renovan. & contingen. prout in eadem Scheda narratur & deducuntur (quæ quidem Scheda pro hic lecto & insert. & haberi vult pars ista proponens quatenus sibi expedit & non al. neque tali modo) habuit tenuit possedit recepit percepit & ad usum suum proprium convertibat & applicuit ac ponit pars ista proponens de quolibet alio numero rerum respective decimabil' & decimarum in Scheda præsentibus ut præfertur annex. respective content. & specificat. majore modo vel minori necnon de tali & tanto numero quali & quant. per probation' legitimas aut confession' partis in eventu hujus litis plenius veniet comproband. ac ponit ut supra Item quod verus valor sive estimatio cujuslibet rei decimabil' rerum respective decimabil' in Scheda præd. præsentibus ut præfertur annex. content. & specificat. quam decimarum sive decimæ partis eorundem ad summas sive respectivos valores in eadem Scheda mentionat. mensibus & annis supradictis eorumve un' vel aliquo communi

muni hominum estimation. notorie se extendebat & extendit ac ponit pars ista proponens de qualibet al. summa five valore rerum respective decimabil. & decimarum medio vel minori necnon de tali & tanta summa five valore qual. & quant. per probationes legitimas in eventu hujus litis plenius veniet comproband. ac ponit ut supra Item quod præfat. Nicholaus Hicks ad solvend. tradend. & deliberand. prænominat. Samueli Woodeson Rector. antedict. seu ejus in hac parte legitimo deputat. omnes & singulas decimas prædict. sic ut præfert. solvi consuetas ac præsertim decimas jura emolumenta Ecclesiastica prædict. præsentibus (sic ut præfertur) annex' content. specificat. vel aliter ad debite componend. cum eodem pro eisd. seu ejus legitim. deputat. sæpius seu saltem congrue & legitime requisit. & interpellat. fuit qui sic requisit. & interpellat. præmiss. seu eorum aliquod facere non curavit neq; in præsentibus curat sed tenuit &olvere recusavit sed saltem plus juste distulit & differt in præsentibus in animæ suæ grave periculum dictique Magistri Samuelis Woodeson Rectoris antedicti præjudicium non modicum & gravamen ac ponit ut supra Item qd. præfat. Nicholaus Hicks fuit & est inhabitan. Paroch. de Huntspill. Bathon. & Wellen. Diocess. & juris. præd.

notorie subdit. & subjeçt. ac ponit ut supra Item quod præmissa omnia & singula fuer. & sunt vera notoria publica manifesta parit. ac famola ac de & super eisdem laborarunt prout in præsentibus laborant publice vox & fama unde facta fide de jure in hac parte requisit. petit pars dicti Magistri Samuel. Woodeson Rectoris antedict. jus & justitiam & ejus complementum sibi fieri & ministrari cum effectu &c. in qua quidem Scheda libello prædict. ut præfertur annex. continetur hic Anglicanis verbis sequen. videlicet Imprimis, **That in the Months and Years aforesaid, all, some or one of them, upon the Tenements, Estate and Lands which he the said Nicholas Hicks had held, possessed and enjoyed in the said Parish of Huntspill, and titheable Places thereof there was kept feeding and depasturing twenty Two Sheep, and of them there was Yearly fallen twenty Lambs, each Lamb worth three Shillings, and the Tithe after that Rate:** Item, that the said Nicholas Hicks in the Months and Years aforesaid, all, some or one of them, within the said Parish of Huntspill, and titheable Places thereof, had and kept feeding and depasturing yearly four Cows and four Heifers, and for the Milk of

of each Cow he is to pay 3 d. and of every Heifer three half pence according to the Custom of the said Parish; Item, That the said Nicholas Hicks of the said Cows and Heifers above-mentioned had fallen yearly six Calves which he bred up for the Pail, for each he is to pay one half Penny according to the Custom of the said Parish: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of them within the Parish of Huntspill, and titheable Places thereof had held and possessed 20 Acres of Meadow which he mowed, or caused to be mowed yearly, for each Acre of which there is yearly due, and he ought to pay to the Rector of Huntspill aforesaid, for and in lieu of Tithe-hay 2 d. according to the Custom of the said Parish: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some or one of them, within the said Parish of Huntspill aforesaid, had and possessed one Garden and two Orchards yearly, for which there is yearly due, and he ought to pay to the Rector of Huntspill aforesaid 3d. according to the Custom of the said Parish, viz. one Penny for his Garden and each Orchard: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of

them, within the Parish of Huntspill, and titheable Places thereof had, and kept feeding and depasturing ten Colts above one Year old, which he sold away before they were used to the Plow the feeding and depasturing of each Colt the Months and Years aforesaid being monthly worth 4 s. and the Tithe after that Rate; and also had and kept feeding and depasturing the Months and Years aforesaid, all, some, or one of them in the said Parish ten Cows, ten Heifers, ten Steers and ten Oxen from the Time he bought them to the Time he sold them off, they were never employed to plow or pail, the Herbage and depasturing of each of the said Cows, Heifers, Steers, and Oxen being monthly worth 4 s. and the Tithes after that Rate: Item, That the said Nicholas Hicks, the Months and Years aforesaid, all, some, or one of them in the said Parish of Huntspill, and titheable Places thereof had and kept four Hares, and of them had fallen and received 4 Colts yearly, for the fall of each he is and ought to pay to the Rector of Huntspill aforesaid one Penny according to the Custom of the said Parish: Item, That the said Nicholas Hicks hath the Months and Years aforesaid, all, or some or one of them, dwelt in the

the said Parish of Huntspill and he and his Wife have received, or at least ought to have received the Holy Sacrament of the Lord's Supper at their own Parish Church for whose Offerings he is yearly to pay to the Rector at Easter or thereabouts 4d. yearly, viz. 2d. for each: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of them within the said Parish and titheable Places thereof had kept and bred up 40 head of Cattle which he sold before they came to the Plow or Pail the Herbage and depasturing of each of the same being monthly worth 40s. and the Tithe after that Rate: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of them within the said Parish of Huntspill, and titheable Places thereof had and kept 6 Cows, 6 Heifers 6 Steers, and six Oxen, after they had been turned off from Plow and Pail, the feeding and depasturing until they were fat and looked on as such, and then sold off from the Grass the Herbage and depasturing of the said Cows Heifers, Steers and Oxen, being monthly worth 5s. and the Tithe after that Rate: Item, that the said Nich. Hicks the Months and Years aforesaid, all, some,

or one of them had and kept feeding and depasturing 8 Cows and Heifers, and of them had fallen and received 8 Calves yearly each Calf at 7 weeks old (which is the Customary time for the Tithe calf) being worth 10s. and the Tithes after that Rate, Prout per copiam libelli & Schedulæ præd. hic in Curia prolata. & lect. inter alia plenius apparet. Ipsumq; Nich. Hicks in præd. Curia Christianitat. coram præfat. iudice spirituali occasione præmissor. comparere ac eidem Sam. Woode-son de & super præmissis respondere minus juste astrinxit ac licet idem Nich. Hicks quolibet anno Annorum præd. quo ipse idem Nicholaus aliquos agnos vitulos sive pullos aliquas vaccas sive juvenecas mulgibil. aliquod fœnum aliqua gardina sive pomaria infra Paroch. præd. finesq; limites & loca decimabilia inde existen. crescen. renovan. sive provenien. habuit vel infra Paroch. præd. habitavit semper paratus fuit & obtulit & adhuc parat. existit ad solvend. eidem Samueli prædict. separal. denar. summas pro decimis agnorum vitulorum pullorum vaccarum & juvenearum mulgibil. fœni gardinorum & pomariorum & pro oblation. prædict. juxta formam & effectum separal. modorum decimandi prædict. licetq; idem Nicholaus omnia & singula præmissa prædict. in ejus exoneration. solution. decimar. pet

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tual Court,
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præfat. Samuel. petit in eadem Curia Christianitatis coram præfat. Iudice Spirituali placitavit & allegavit ac inevitabili testimonio probare sæpius obtulit idem tamen Iudex Spiritualis placitum allegacon. & probacon. ill. admittere seu recipere penitus recusavit ac præd. Richardus Heley præd. Nicholaum per definitivam dictæ Curia Christianitatis sententiam de & super præmissis in libello & Scheda prædict. content. condemnare & ad decimas præd. in forma prædict. petitas solvend. compellere totis suis viribus conatur ac indices machinatur in dict. Domini Regis & Domina Regina nunc contemptum coron. & dignitat. suarum & ipsius Nicholai Hicks grave dampnum præjudicium & depauperacon. manifest. & contra debitam legis formam & præscription. & consuetud. & modos decimandi prædict. ac licet præd. Nicholaus Hicks ultimo die Augusti Anno Regni dict. Domini Willielmi & Domina Mariae nunc Regis & Reginae Angliae &c. quinto apud Huntspill præd. in Com. præd. Breve dictorum Domini Regis & Domina Reginae de prohibition. in contrar. præfat. Samueli Woodeson deliberavit Idem tamen Samuel Woodeson placitum illud versus præfat. Nicholaum prosequi non cessavit sed placitum ill. ulterius in Curia Christianitat.

præd. prosecut. fuit (præd. breve de Prohibitione non obstante) in dictorum Domini Regis & Domina Reginae nunc contemptum & contra prohibition. prædict. unde idem Nicholaus qui tam pro Domino Rege & Domina Regina quam pro seipso &c. dicit qd. ipse deteriorat. est & dampnum habet ad valentiam 200 l. & inde tam pro Domino Rege & Domina Regina quam pro seipso producit sectam, &c.

Et modo ad hunc diem scilt. diem veneris prox. post crastin. sanctæ Trinitatis isto eodem Termino usque quem diem præd. Samuel Woodeson habuit licentiam ad bill. præd. interloquend. & tunc ad respondend. &c. coram Domino Rege & Domina Regina apud Westm. venit tam prædict. Nicholaus Hicks qui tam &c. per Attorn. suum prædict. quam prædict. Samuel Woodeson per Egidium Clerk Attorn. suum & idem Samuel defend. vim & injur. quando &c. & omnem contemptum & quicquid &c. Et dicit quod ipse non est prosecut. pl'itum prædict. versus præfat. Nicholaum in Curia Christianitat. post prohibicon. dict. Domini Regis & Domina Reginae sibi inde deliberat. pro ut prædict. Nich'us qui tam &c. superius suppon. & de hoc pon. se super patriam Et prædict. Nicholaus qui tam &c. inde similiter &c. sed pro brevi Domini Regis & Dominae

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Traverse.

minæ Reginae de consultatione quoad decimas agnorum pro quibus idem Samuel præd. Nicholaum in Curia Christianitatis præd. coram præfato Iudice Spirituali traxit in placitum habend. idem Samuel dicit qd' præd. Nicholaus mensibus & annis in narratione præd' specificat. habuit custodivit & depasturavit super terras & tenementa sua infra parochiam de Huntspill prædict. viginti oves matrices & ex illis habuit viginti agnos annuatim quemlibet eorum valoris 3 s. pro decimis quorum quidem agnorum eidem Samueli ut Rectori Ecclesiæ paroch. præd. debit. & solubil. idem Samuel ipsum Nicholaum in Curia Christianitatis præd. coram præfat. Iudice Spirituali ante prosecution' præd. brevis de prohibition' traxit in placitum prout ei bene licuit absq; hoc quod infra paroch. de Huntspill præd. finesq; limites & loca decimabilia parochiæ illius habetur & a tempore cujus contrar. memoria hominum non existit habebatur talis consuetudo & modus decimandi de & concernen. decimas agnorum ibidem caden. part. & provenien. videlt. quod quilibet occupator aliquarum terrarum sive tenementorum infra paroch. præd. finesq; limites & loca decimabilia ejusdem paroch. qui in aliquo anno aliquem agnum sive agnos sub numero septem agnorum infra paroch. ill. fi-

nesq; limites & loca decimabilia inde part. & provenien. habuit & solvit & a toto tempore supradicto solvere usus fuit & consuevit Rectori Ecclesiæ parochial. de Huntspill præd. ejusve Firmar. sive Deputat. Rectoriæ illius pro tempore existen. eodem anno unum obolum simulis legalis monetæ Angliæ pro quolibet tali agno sic sub numero septem agnorum part' & provenien' in plena satisfactione solucon' & contentacon. omnium decimarum agnorum ill. sed si idem occupator in aliquo hujusmodi anno infra paroch. ill. finesq; limites & loca decimabilia inde aliquos agnos ad plenum numerum septem annorum part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore supradicto reddere & deliberare usus fuit & consuevit Rectori Ecclesiæ paroch. de Huntspill præd. ejusve Firmar. sive Deputat. Rectoriæ illius pro tempore existen. unum agnum eorundem septem agnorum tali anno in plena satisfactione solucon. & contentacon. & nomine & loco decimarum eorundem septem agnorum ac si idem occupator in aliquo uno anno aliquos agnos ad plenum numerum septemdecim agnorum infra paroch. ill. finesq; limites & loca decimabilia inde part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore supradicto reddere

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Traverse.

reddere & deliberare usus fuit & consuevit Rectori Ecclesie paroch. de Huntspill prædict. ejusve Firmar. sive Deputat. Rectorie illius pro tempore existen. duos agnos eorundem septemdecimagnorum quolibet tali anno pro decimis eorundem septemdecim agnorum prout præd. Nicholaus superius inde queritur Et hoc parat. est verificare unde pet. judicium & breve dicti Domini Regis & Domine Regine de consultatione quoad decimas agnorum præd. sibi in hac parte concedi &c. Et pro consultatione habend. quoad decimas vitulorum prædict. pro quibus idem Samuel ipsum Nicholaum in Curia Christianitatis præd. coram præfat. Judice Spirituali traxit in placitum Idem Samuel dicit quod præd. Nicholaus in mensibus & annis præd. habuit custodivit & depasturavit super terras & tenementa sua infra paroch. præd. sexdecim vaccas & juvenecas & ex illis habuit quatuordecim vitulos annuatim cadent. part. & provenien. quemlibet eorum vitulorum valoris decem solidorum pro decimis quorum quidem vitulorum eidem Samueli ut Rectori Ecclesie parochie præd. debet. & solubil. idem Samuel ipsum Nicholaum in Curia Christianitat. præd. coram præfat. Judice Spirituali ante prosecution. præd. brevis de prohibition. traxit in placitum prout ei bene licuit Absq. hoc quod

infra paroch. de Huntspill prædict. finesq; limites & loca decimabilia inde habetur & a tempore cujus contrar. memoria hominum non existit habebatur consuetudo quod quilibet occupator aliquarum terrarum sive tenementorum infra paroch. præd. finesque limites & loca decimabilia ejusdem paroch. qui aliquem vitulum sive aliquos vitulos sub numero septem vitulorum infra paroch. ill. finesq; limites & loca decimabil. inde in aliquo anno part. & provenien. habuit & solvit & a toto tempore suprad. solvere usus fuit & consuevit Rectori Ecclesie paroch. de Huntspill prædict. ejusve Firmar. sive Deputat. Rectorie illius pro tempore existen. quolibet tali anno unum obolum talis legalis monete pro quolibet eorundem vitulorum in plena satisfaction. solucon. & contentacon. omnium decimarum vitulorum illorum sed si idem occupator (as before for Lambs) & pro consultatione habend. quoad decimas pro depasturation. pullorum vaccarum juvenecorum juvenearum & bovis minime mulgibil. nec aratro usitat. nec non al. averiorum infructiferorum infra paroch. præd. depasturat. pro quibus idem Samuel præfat. Nicholaum in Curia Christianitat. præd. coram præfat. Judice Spirituali traxit in placitum idem Samuel dicit quod. præd. Nicholaus in quolibet anno annorum prædict.

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dict. habuit custodivit & depasturavit super terras & tementa sua prædict. infra paroch. præd' pullos vaccas juvencas & boves minime mulgibil. seu aratro usitat. & alia averia infructifera in narratione præd. mentionat. pro decimis quorum quidem averiorum depasturatione eidem Samueli ut Rectori Ecclesiæ parochialis præd. debit. & solubil. idē Samuel ipse Nicholaum in Cur. Christianitat. præd. coram præfat. Judice Spirituali ante prosecution. præd. brevis de prohibition. ut præfertur traxit in placitum prout ei benelicuit absq; hoc quod infra præd. Hundred. de Huntspill & Puriton est & a toto tempore supradict. fuit antiqua consuetudo a toto tempore supradicto usitat. & approbat. quod omnes inhabitantes infra Hundred. præd. aliquas terras prata seu pastur. infra Hundred. præd. occupantes fuer. liberi immunes & exonerat. & de tempore in tempus a toto tempore supradict. liberi immunes & exonerat. esse debuer. de & a solucon' aliquarum decimarum de aut pro depasturacon' aliquorum averiorum minime mulgibil. seu aratro usitat. Anglice not employed to plough or pail per ipsos depast. in aliquibus terris pratis seu pastur. infra Hundred. de Huntspill & Puriton præd. existen. put præd. Nicholaus superius

Traverse.

queritur Et hoc parat. est verificare unde pet' iudicium & breve dict. Dom. Regis & Domine Regine de consultatione quoad obligacon' & decimas pro depasturation. averiorum minime mulgibil' nec aratro usitat. & al infructiferorum averiorum pro quibus idē Samuel ipsum Nicholaum in Curia Christianitat. præd. ut præfertur traxit in placitum sibi in hac parte concedi, &c. Et p brevi dict. Dom. Regis & Dom. Regine pro consultatione habend. quoad oblation. præd. decimas vaccarum & juvencarum mulgibil. præd' decimas fœni præd. decimas gardin. & pomar' & præd. decimas præd. quatuor pullorum in paroch. prædict. annuatim cadent. pro quibus idem Samuel ipsum Nicholaum in Curia Christianitat. prædict. traxit in placitum idem Samuel petit iudicium de narratione præd. quia dicit quod narratio illa materiaq. in eadē content. minus sufficien. in lege existunt ad ipsum Samuel. ad narration. ill. quoad easdē oblation. & decimas respondere compellend. Ad quam idem Samuel necesse non habet nec per legem terrarum tenetur aliquo modo respondere Et hoc parat. est verificare unde pro defectu sufficien. narration. in hac parte idem Samuel petit iudicium de narr. præd. & quod narratio illa quoad oblation. & decimas ill. cassetur.

&c

& quod Breve dictorum Domini Regis & Dominae Reginae ei inde concedatur, &c. Et præd' Nicholaus dicit quod per aliqua per prædictum Samuelem superius placitando allegat. idem Samuel Breve dicti Domini Regis & Dominae Reginae de consultatione habere non debet quia quoad præd' placitum præd. Samuelis modo & forma placitat. quoad decimas agnorum pro quibus idem Samuel ipsum Nicholaum in Curia Christianitatis præd. coram præfat. iudice Spirituali traxit in placitum idem Ni-

cholaus ut prius dicit quod infra paroch. de Huntspill præd. finesq. limites & loca decimabilia paroch. illæ habetur & a tempore cujus contrar. memoria hominum non existit habebatur talis consuetudo & modus decimandi de & concernen' decimis agnorum ibidem caden' part. & provenien. videlt. as before; the like modus for Calves as before, the like modus to be exempted in non decimando for the Inhabitants &c. as before, and a Joinder in Demurrer as to the rest.

Hicks *versus* Woodeson.

2 Salk.
655.

In a Prohibition the Plaintiff suggested, that the Parish of Huntspill is an ancient Parish, of which he was an Inhabitant, and used Lands there; that in the said Parish there is a Custom to pay several small Sums to the Parson in lieu of small Tithes, which Sums are particularly set forth, that this Parish was within the Hundred of Huntspill, and that there is a Custom also for every Inhabitant and Occupier of Lands within the said Hundred to be discharged of Tithes for the Pasture of barren and unprofitable Cattle.

The Defendant traversed the Customs, and Issue being thereupon joined, it was found for the Plaintiff.

And now it was moved in Arrest of Judgment, 1. that a Custom alledged in non decimando in a whole Hundred, is void in Law.

(2.) Admitting it to be good, yet it was not well pleaded here, because the Plaintiff had not shewn that there was a sufficient Maintenance for the Parson besides those Tithes.

First, it was argued, that this Custom was against Common Right, because there was never yet any Precedent of a Custom to discharge a Layman in non decimando: 'Tis agreed as to Ecclesiastical Persons such a Custom may be good, but not as to a Layman, because

because he was not capable, at the Common Law to have Cithes, and therefore could not sue for them in the Spiritual Court, but now he is enabled by the Statute of 32 H. 8. c. 7.

And as Cithes in general are due of common Right, so this particular Cithe of Agistment of barren Cattle is due the rather, because those which are for the Cart are discharged by custom; 'tis the whole Profits of the Land out of which some things must be paid to the Parson.

A Layman is allowed to prescribe in modo decimandi, but not to be exempted from all Cithes in general, because some must be paid, and are due of Common Right, tho' the Quantity be ascertained by Custom and Usage.

If therefore Cithes are due of Common Right, such a Prescription either in a Hundred or County will not be good, because if it should be allowed, every Person in that Hundred or County might prescribe, nothing would be left for the Parson.

'Tis true, my Lord Rolle affirms the contrary, but denies it again in the same Line, which shews that Book to be of little Authority in this Case. 1 Roll. Abr. 653. pl. 9.
1 Roll. Abr. 654.

'Tis likewise said in the same Book, that a Prohibition was granted in a Case of the same Nature with this, which was thus; viz. A Man prescribed to a Custom within two Hundreds of Middlesex and Surrey, that if a Common Baker dwelling in either of these Hundreds, should erect a Mill there to grind Corn for his Trade, and sell it to Customers in or near those Hundreds for their Sustenance, that such a Baker should pay no Cithes for the Corn. Kidder ver-
sus Edwards.

But the Reason upon which that Case was adjudged, doth not suit with this; for the Parson there had more and greater Cithes out of the Lands of the Inhabitants, and of them who were sustained in those Hundreds, than he could have by the manual Occupation of a Miller.

In Michaelmas Term, 11 Car. and in the same Book 'tis mentioned, that a Prohibition was granted upon a Summise, that Cithes ought not to be paid for Pheasants Eggs, or young Pheasants hatched in Woods enclosed in the Chiltern of Buckinghamshire, but that was because they were ferae Naturae. 1 Roll. Abr. 636.

Such a Custom as is here alledged, could never have a reasonable Commencement, because of common Right, Cithes ought to be paid out of all Land; and tho' before the Council of Lateran no Person could claim them because there were no Parishes, yet still they were due to the Church, 11 Rep. Priddle ver-
sus Napier.
Hob. 296.

tho' it was in the Power of the Donor to give them to what Spiritual Person he thought fit.

'Tis in favorem Ecclesie, that the Law will not allow a Prescription in non decimando to prevail against her; 'tis true, a Prescription strengthens all other Titles, but is of no Force when pleaded in Discharge of Tithes, because the Law presumes that a Layman cannot be absolutely discharged without the Consent of the Parson, Patron and Ordinary; and then likewise the Grant of such Discharge or Exemption must appear.

2 Bulst. 285.

This was the Opinion of Justice Doderidge grounded upon the Authority of Lyndewode and of the Author of the Doctor and Student: The whole Country may be discharged of Tithes, but that such Discharge ought to have a reasonable Commencement, which must be shewed.

Now it would be very strange, that the Law should reject a Prescription to be discharged of Tithes in a particular Place, and yet to allow a Custom in a whole Hundred in non decimando.

1 Roll. Abr.

654. pl. 12.

Litt. Rep.

152.

2 Inst. 653.

One single Instance may be given, where such a Custom hath been allowed; 'tis in my Lord Rolles Abridgment, and it was for the Milk of Cows; and probably the Reason might be, that such Milk is of little value to the Parson, and doth not much contribute to his Maintenance for which Tithes were originally ordained; but 'tis but one single Case which doth not make a Law.

2 Bulst. 285.

The Case of Russel and Backhurst which seems to give some Colour to such a Custom, is a controverted Case; it was thus, viz. The Parson libelled for Tithe-wood, and the Defendant prayed a Prohibition by Reason of a Prescription in non decimando for Wood growing in the Weld of Kent; 'tis true, the Prescription there was denied, and no Prohibition granted: This was in Michaelmas Term 12 Jacobi, and yet but two years afterwards there was a Trial at Bar in this Court upon a Prohibition, where such a Prescription was suggested to be discharged of Tithes of the Under-wood growing in the Weld of Sussex, and it was found for the Plaintiff, and the Court held the Prescription good.

1 Roll. Abr.

653. pl. 10.

But admitting such a Prescription in non decimando for Under-wood in a Weld be good, yet it will not affect this Case, because in antient Times there were many Controversies about such Tithes; for at the Common Law Tithes were not to be paid for Trees, because cutting them down is

is not an Increase of their Growth (as in Corn) but a total Destruction; 'tis an uncertain Profit, and not arising yearly for the Maintenance of the Parson, neither are those Tithes due of Common Right, but by Custom and Usage; and therefore in those Days, and in those Places where Tithewood was due only by Custom, the Parishioners procured Wood of other Lands for the Parson and his Successors in Satisfaction of all Tithewood in the same Parish.

13 Rep. 13.

Several Petitions have been made to the Parliament concerning the Right to such Tithes, untill the Statute of Sylva caedua was made, by which all those Controversies were ended, it being enacted, that Tithes should not be paid for Wood of twenty years Growth or more, which implies it should be paid for all under that Age.

45 Ed. 3.
ca. 3.

'Tis true, it was the Opinion of my Lord Coke, that such a Prescription in a County, not only for Wood, but for any other Tithes, is good; but that can be no Reason why it should be allowed in an Hundred, because the Court cannot judicially take notice what a Hundred is, or what it comprehends; 'tis a Liberty in its Commencement; 'tis to have a Jurisdiction over an Hundred, Mills, or so many Parishes; and therefore it hath been held, that a Leet could not be Parcel of an Hundred, because they are both Liberties, and one Liberty cannot be Parcel of another.

2 Inst. 649.

8 H. 7. 1. b.

But it doth not appear by the Pleading, that there are more than one Parish in this Hundred; if so, such a Custom in a Parish can never be made good.

Besides, there is no Consequence to say that there is such a Custom in a County, therefore it may be in a Hundred; because there can be no Inference from one to the other, and even in that Case it will be very difficult to find a Reason how a County at first came to be exempted from Payment of Tithes.

My Lord Rolle uses the words Province and County as synonymous; now a Province being only a Circuit within the Jurisdiction of an Archbishop, probably there might be an Agreement between the Clergy and the Laity, that such a Place, &c. should be exempted from the Payment of Tithes.

But there could be no such Agreement in an Hundred, because that was divided from the County, and became a particular District, and the Inheritance of several persons, but the Bailiwicks thereof were reunited to the Counties by the Statute of Ed. 3.

4 Ed. 3. c. 15.
14 Ed. 3.
ca. 9.

¹ R. Ab. 653.² Inst. 645.

'Tis agreed on all sides, that a Single Parish cannot have such a Custom; and this is a strong Reason why a Hundred cannot, because it consists, and is made up of several Parishes; and 'tis as good a Reason that an Hundred cannot have such a Custom because a Parish cannot, as 'tis to say a County may, and therefore an Hundred may have it.

(2.) But admitting an Hundred to be capable of such a Custom, yet it cannot be so large as this, because there must be a sufficient Maintenance left for the Parson, which doth not appear in this Case, and so are all the Books where such Prescriptions have been allowed, which are very few, but never to have such Effect as this, viz. to take away the Maintenance of the Parson; and therefore the Plaintiff in the Prohibition ought to have shewn that there was sufficient for him besides, because it is a Discharge against common Right, and no other Reason can support it, but to shew that the Parson hath uberores decimas besides the Tithes alledged to be exempted; and this was the only Reason of the Judgment in the Case of Kidder and Edwards, Roll. Ab. 1 part. 654.

Econtra. If there may be a Custom (as 'tis admitted) to be discharged in a whole County of Tithe-Milk, and of Tithe-Corn ground at such a Mill or Mills in an Hundred; there may be also a Custom to be discharged of the Tithes of fat Cattel, and if the Parson hath lived without such Tithes time out of Mind, he may live so still.

'Tis granted on the other Side, and an Authority was produced of a Custom to be discharged of Tithes out of two Hundreds, and there can be no Reason, if that is Law, why such a Custom may not be good in one Hundred. It has been objected, that a Layman cannot prescribe in non decimando, but no good Reason can be given for it.

It cannot be because of any Disability in his Person; for as to this matter there is no Difference between a Layman and a Clerk; it must therefore be in favorem Ecclesie, and introduced by Ecclesiastical Persons who were formerly Judges here, as part of the Canon Law, who had in those Days such a Power over the Laity, that they would not suffer such a Prescription to be tried by them, neither would they suffer them to sue for Tithes in their Courts.

This is the Reason why 'tis generally said in our Books that a Layman cannot prescribe in non decimando; but tho' he cannot prescribe, &c. yet there may be a Custom to exempt him from Tithes, and such a Custom is of as good Authority as a Prescription; for if 'tis established by long Usage and by common Consent of our Ancestors, it passes into a Law of that Place, and is of equal Force with a Prescription.

Such is the Custom of Gavelkind, and Borough-English, which is the Law of England, and as antient as the Common Law in the Places where these Customs prevail. 40 Aff. pl. 27. 21 Ed. 4. 52 a.

'Tis true, where a Custom of a publick Nature is alleged in a particular Will or Place, it must be shewed, that 'tis an antient Will; as, where a Man claimed Lands on the South Side of a Will, setting forth, that they were Time out of Mind devisable; and so derived a Title to himself by a feoffment from the last Deviser; this was held void, because it being a Custom against Common Law, he ought to set forth that the Will was an antient Will.

But if he had alledged, such a Custom in a Borough, which ex vi termini imports a Place of Antiquity, it had been good.

Now in this Case 'tis alledged That the Parish of Huntspill is an antient Parish, and then the Custom is set forth, which is agreeable to the Authority before mentioned.

And if the Custom is not contrary to Reason and Justice the Judges never enquire into the Commencement of it.

No Man can say, That this Custom is unreasonable, because it goes only in Discharge of a single Duty; now all the Books which condemn Prescriptions in non decimando, either in a County or in a Parish, are where they are made generally of all Tithes, but they are seldom denied for a particular Thing as in this Case.

And therefore a Custom to pass in a ferry-boat Toll-free hath been adjudged good (tho' 'tis far more unreasonable than this) because 'tis only a Discharge to the Person claiming it, and may be a Charge to another.

So there are many Things which are not titheable of Common Right, as fish taken in the Sea, Rabbits and Pidgeons spent in the House, &c. and yet by Custom Tithes of those Things have been paid to the Parson; if therefore 'tis a reasonable Custom for the Clergy to charge the Laity with Tithes of such Things which of common Right ought not to be chargeable, 'tis as reasonable that a Layman may discharge himself by a Custom in a Place where none have been usually paid. Cro. Cat. 264. 1 Roll. Abt. 642, 646.

Such

Dr. and Stu-
dent 167.
13 Rep. 13.

Such a Custom (as has been observed) is not good in a Parish, not because 'tis inconsistent with the Law; the Reason is, a single Person or Parish are not capable of such a Custom. Besides, the Law requires, that the Parishioners should shew what Recompence the Parson hath in Lieu of his Tithes, by which it may appear that the Custom had a reasonable Commencement; but no such Thing is required of a whole County, because it cannot with any Shadow of Reason be pretended, That all the Inhabitants could or can conspire to defraud their respective Parsons.

43 Ed. 3. 32.
pl. 30.

But there are Books which allow a Custom or Usage to be good in Places of as large Extent, which Customs will not bind when alledged in a Will; as in a Cessavit per biennium, the Lord shewed the Custom of the Place to be, that where the Tenant did not pay his Services in two Years, he might enter and hold the Lands till he was satisfied of the Arrears; this was held to be void, because the Usage was alledged in a particular Will only, and not shewed, that it was customary so to do in the Wills round about.

1 Roll. Abr.
562.

But a Custom in an Hundred in Kent, that if any one be charged to have gotten Children in Adultery, and cannot acquit himself by Law, that then he shall forfeit all his Goods to the King; this was held a good Custom.

44 Ed. 3. 19.
pl. 14
21 Ed. 4. 24.

So a Custom in an Hundred, if a Waif or Estray be esloigned, and 'tis presented that it came to the Possession of any dwelling within the Hundred, that the Lord may distrain 'till he make Restitution.

So a Custom that an Infant of the Age of 15, may make a Feoffment, and sell his Lands; all these are against Common Law; but being used in an Hundred or County, are thereby become the Laws of the Places where they obtain.

1 Saund. 141.

But to come nearer to the Case, it will not be denied that a Custom alledged in a Parish, for all Underwood to be discharged of Tithes, which is used in that Parish for fencing Corn, is good; but then you must shew that the Tithe of that Corn is paid to the Rector; but it may be alledged in a County, Ward or Country without any Consideration at all.

Br. Abr. tit.
Dismes
pl. 14;
March 25.
1 Roll. Rep.
22.

And therefore Brook in his Abridgment referring to the Author of Doctor and Student saith, That a Man cannot prescribe in a Will to be discharged of Tithes, because 'tis too particular; but such a Prescription is good in a whole County or Hundred, because 'tis the Custom of the Place.

It

It has been objected, that a Custom in non decimando may be good in a County, but not in a Hundred, because of the Uncertainty of its Extent: Sure that is a Reason of very little Force, for the Limits of a County are altogether as incertain as those of a Hundred; but a Hundred is a known Precinct, and not barely a Liberty (as has been said) tho' there may be many Liberties therein; for when granted to a Subject, 'tis a Liberty, but when it remains part of the County 'tis otherwise; and therefore in an Abowry a Man may prescribe by a Que estate to have a Leet in an Hundred; but if a Quo warranto be brought against the Hundred, he must then set forth his Title.

Besides, if the Words Province and County are synonymous, a County and Hundred are so too; and that in the Meaning of the Law, as may plainly appear; for all Issues are to be tried by Jurors of the County, that is, by Jurors of the Hundred; for it was a good Challenge at the Common Law if there were no Hundredors of the Jury.

2 H. 4. 6.

11 H. 4. 2.

In the Statute of Winton, these Words are used promiscuously; it appoints, that Inquests of Felonies and Robberies shall be taken in Towns, Hundreds, Franchises and Counties, so that the Offender may be attainted; and if the County will not answer for him, then it shall be answerable for the Robbery done, so that the whole Hundred where the Robbery is committed, shall be liable.

13 Ed. 1. c. 2.

Such a Custom in a Hundred hath never yet been condemned, for it never came in Judgment but in the Case for Tithewood, and there it was held to be a good Custom, even in a whole Ward; and what Reason can be given why it should not be good in an Hundred as well as in a Ward, which is as antient as the other, especially when it cannot be denied but such a Discharge might begin by Composition.

'Tis objected, That Tithewood is not due of common Right, as all other Tithes are, and therefore a Custom in non decimando for Wood in an Hundred may be good.

But Tithewood is due of common Right; if not, to what Purpose was the Statute de Sylva cadua made? It was to ascertain what Wood should pay Tithes, and what should be exempted; and why did the Nobility and Commons prefer several Petitions to the King after the making that Statute that it might be explained what was meant by Sylva cadua, if no Tithes were due for Wood, which is an Admission, that Tithes had been paid for it before that Act.

1 Roll. Abr.

638, 639.

2 Inst. 643.

Agreeable

Agreeable to this is the common way of demanding Tithes for Wood at this Time; for the Libel is always general, which shews that the Party hath a Right to demand; for if he had not, then he must alledge a Custom, and yet Prohibitions are never granted upon such general Libels.

Suggestions are also made always in the Affirmative, but if they were due by Custom, and not of Right, then they ought to be in the Negative viz. to deny that there is any such Custom.

2. Point. Then as to the Objection, that it doth not appear that the Parson hath a sufficient Maintenance left, the Pleading seems to be otherwise; for there are several modus's set forth for Tithes yearly arising in the Parish, which may give him a convenient Maintenance every Year; and if he hath a sufficient Provision by any one Modus, 'tis not material by whom he receives it.

Curia. It will be difficult to shew a non decimando for any Tithes besides those of Wood; for all the Cases which incline to such a Custom, are put generally, viz. that a County or a Hundred may thus prescribe, but do not mention what Tithes are in Question.

Doctor &
Student 164.
a. 169. b.
Godolph.
467.

Now if Tithes of Wood had been due of common Right, to what Purpose was that Canon made by Archbishop Stratford, 17 Ed. 3. that Tithes of Sylva cadua shall be paid: Against which Canon there was a Petition made to the Parliament in that very Year reciting the antient Usage to be, that Tithes should not be paid for Wood; and the Petition was answered, that a Prohibition should be granted against the Canon, where Tithes of Wood have not been accustomed to be paid.

'Tis true, the Ecclesiastical Courts do hold, that Tithes are due of common Right for every Thing, nay, even for Stones or Gravel digged out of Pits, but the Common Law is otherwise; for Tithes of common Right are due only for such Things which arise by annual Profits; now tho' Trees are renewing yearly, yet they yield no annual Profit, and therefore Tithes are not paid for them.

Therefore where Tithes are paid for Things which do not arise by such means, they must be due by Custom.

But such a Custom in non decimando cannot be good, and therefore a Consultation was granted.

Rex & Regina *versus* Trobridge.

A Writ of Error to reverse a Judgment in an Indictment for erecting of a Cottage, and not laying of four Acres of Land to it, Et ulterius jur. &c. Presentant, that the Defendant did continue it contra formam Statuti. i Sal7. 371.

The Errors assigned were;

(1.) In the Return which is uncertain, for it was returnable ad proximam Sessionem ubicunq; whereas it should have been ad proximam generalem Sessionem pacis: Sed non allocatur; for one is as uncertain as the other.

(2.) 'Tis for erecting and continuing of a Cottage; but doth not say pro habitatione; and 'tis no Offence unless it is inhabited. for the Statute was made to prevent the building of Cottages for the Habitation of poor People; sed non allocatur, for if 'tis applied to any other use than a Dwelling-house, the Defendant must shew it, or otherwise it shall be intended to be built for his Habitation.

(3.) 'Tis an Indictment for two Offences viz. for erecting and continuing; 'tis said presentat. existit. that he did erect, &c. and then about the middle of the Indictment 'tis, ulterius presentant, that he did continue, and then concludes, contra formam Statuti. Now the Offences being several, and being divided by the Words ulterius presentant, &c. the Conclusion shall only go to the Offence last mentioned, which was the continuing, and not the erecting of the Cottage; 'tis as distinct as if it had been a new Indictment, and therefore it doth not appear that the Defendant was indicted for erecting, &c.

'Tis not like the Case in my Lord Coke's Entries, where contra ligeanciam suam debitum went to the whole Indictment, in which, tho' there were many Overt-Acts laid, yet there was but one Treason, but here are two distinct Offences; for which Reason the Indictment was quashed. Fol. 361.

Robinson *versus* Smith.

Trin. 6 Willielmi, Rot. 192.

TRESPASS for taking and impounding of his Cow.
 The Defendant pleaded, that at the Time of the Trespass, &c. he was seised of several Lands parcel. manerii de Musgrave parva, unde quoddam clausum vocat. Lowhill Meadow est & fuit parcel. ut de statu customario hereditario descendible from Ancestors to Heir, according to the Custom of the said Manor, and that the Plaintiff's Cow was in the said Close doing Damages, &c.

The Plaintiff demurred generally.

(1.) It was said for him, that it did not appear by the Plea, that Lowhill was Parcel of the Land of which the Defendant was seised, but Parcel of the Manor; for the Word unde being a Relative, refers ad proximum Antecedens, which is the Manor.

(2.) 'Tis said he was seised de statu hereditario descendible, &c. and doth not shew of whose Grant; for tho' it may not appear who was the first Grantee, it being so long since the Coppelhold was granted, yet the Admittance of an Heir upon a Surrender or Descent, doth amount to a Grant, and ought to be so pleaded.

2 Cro. 103.
4 Rep. 22 b.

Econtra. The Defendant doth not justify by reason of a Title, but for a Wrong done; and therefore though he saith seiscus fuit, &c. and doth not shew how, or in what manner, yet since it was only a Tort with which he was charged, 'tis well enough, and it must have been agreed to be so, if he had said possessionatus fuit instead of seiscus.

But the Court were of another Opinion, for where Heir in Fee is pleaded of a Coppelhold Estate by way of justifying of an Offence with which the Defendant is charged, he must set out the Commencement of his Estate; and therefore the Plaintiff had Judgment.

Allen *versus* Symonds.

Pasch. 6 Willicelmi Rot. 299.

An Action on the Case was brought against the Defendant by the Name of Symonds.

He pleaded in Abatement, that from the Time of his Birth to the Time of the Action brought, he was known by the Name of Symms; and traversed that he was known by the Name of Symonds.

The Plaintiff replied, that the said Defendant was known as well by the one Name as by the other; and upon a Demurrer the Court inclined that this Plea was a good Plea. Rast. Ent. 616. Vet. Entr. 27.

But at another Day they being of Opinion that the precedents were both ways upon a Traverse, the Defendant was advised to take a new Declaration, which he consented to do accordingly; but without Costs.

Crump *versus* Halford.

Hill. 4 & 5 Willicelmi & Mariae Rot. 939.

TRESPASS for taking and detaining of a Silver Tankard. Upon Not guilty pleaded, the Jury found a special Verdict to this Purpose, viz.

They find the Statute of 1 Willicelmi & Mariae prohibiting all Trade and Commerce with France, in which there is a Proviso, That no Person shall after the 10th Day of September then next following demand or take more than 6 d. for a Quart of French Wine.

Then they find the Act of 2 W. & M. for more effectual putting in Execution the former Act, whereby 'tis enacted, That if any Person after the first Day of February 1690. shall sell Wine by Retail in Glass Bottles, or in any other Measure not made with Pewter, &c. or shall sell the same for a greater Price than appointed by the former Act, and shall be convicted thereof by Confession, or the Oath of two Witnesses, being prosecuted within 30

Y y 2

Days

Days after the Offence committed, shall for every Offence pay 50 s. and if not paid upon Demand, then to be levied by Distress by Warrant under the Hand and Seal of such Justice &c. before whom the Conviction was made; which Warrant the Justice is required to grant to the Constable, &c. who is authorized to levy the same &c. and for Want of sufficient Distress, to commit the Offender untill he pay the Penalty, and all necessary Costs to be taxed by the Justice of Peace before whom the Conviction is made.

They find, that 3 Augusti 4 W. & M. Sir Richard Bulkley being a Justice of Peace of the County where the Offence was committed, did direct his Warrant to the Constable of the Parish, &c. which they find in hæc verba; by which it did appear, that the Defendant was convicted before him, for that he 9 Julii instantis did sell Wine in eighteen Glass Bottles, for which he had forfeited to the Informer 50 s. for each Bottle; and by this Warrant the Constable was commanded to levy 45 l. and Costs by Distress of the Plaintiff's Goods, and for Want of sufficient Distress, to apprehend him. It was dated in August.

They find that the said 2 Julii 4 Wilhelmi the Plaintiff was a Retailer of Wines, and that the Warrant of the Justice of Peace was directed to the Defendant Halford, who by Virtue thereof levied the silver Tankard, for which the Action is now brought, and so they make a general Conclusion, &c.

It was argued for the Plaintiff, that he was entitled to the Action, and that neither the Act of Parliament, or the Warrant of the Justice could excuse the Defendant for this Wrong done.

- (1.) Because the Warrant is illegal,
- (2.) Because the Defendant, tho' an Officer, yet in this Case shall be punished for acting under a void Warrant.

1. That the Warrant was illegal, it was thus argued, viz. there are two Acts of Parliament found by the Verdict; the first settles the Offence, the second reduceth the Forfeiture to 50 s. for the Benefit of the Informer; but in both 'tis to be levied for every Offence, viz. not for every Bottle drunk at one Sitting, if twenty or more, for that is but one Offence being but only at one Time, and not for every Bottle; but the Warrant directs that eighteen Penalties shall be levied for one Offence.

2. The

2. The Offence is laid to be committed 9 Julii instantis and the Warrant is dated in August, but it doth not appear when that 9th of July was, and therefore non constat, whether the Prosecution was within the 30 Days limited by the Act,

3. The Statute allows Costs, where there is not sufficient Distress to be made, and it must be after the Commitment of the Offender; but this Warrant directs Costs to be paid for the original Offence.

2d. Point. The Warrant tho' directed to the Defendant as an Officer will not excuse him.

'Tis true where a Court hath a general Jurisdiction of the Cause, and sendeth a void or an illegal Warrant to the Officer, he shall be excused in executing it.

So likewise if a Justice of Peace proceeds irregularly, and it doth not appear so upon the Face of the Warrant; as, if he sends it to apprehend a felon without Oath made of the felony committed, and the Officer executes it, he shall be excused; but the Justice is a Trespasser.

But where a Defect appears in the Body of the Warrant it self, as in this Case, the Officer is bound to take Notice of it at his Peril, tho' he is not equally bound to take Notice of little Niceties.

And to prove this the Case of Nichols against the Church-wardens of Hatfield was cited as an Authority in point; it was thus, viz. Tateridge was a Parish in Reputation for 60 Years, tho' antiently parcel of Hatfield; the Churchwardens of Hatfield imagining, That they had Power by Virtue of the Statute of 43 Eliz. cap. 2. to tax the Inhabitants of Tateridge to the Relief of their Poor did tax them accordingly, and upon Refusal to pay the Rate procured a Warrant to levy it, which was done upon Nichols the Plaintiff who brought the Action; and the Church-wardens justified under the Warrant, and it was adjudged that it would not excuse them.

'Tis true, the Church-wardens went out of the Parish to levy that Rate, but that was not the Reason of the Judgment; it was because the Justices of Peace had only a particular Power to make Warrants to levy Rates, which were well assessed, and therefore the Church-wardens at their Peril ought to take Notice whether the Justices had executed their Power according to Law; and it appearing that the Rate was illegally taxed, the Warrant of the Justice

Cro. Car.
394.
2 Roll. Abr.
560.

Justice will not excuse the Church-wardens in taking the Distress.

1 Vent. 273.
2 Lev. 139.

This Case is good Law at this Day, and the Authority of it was never shaken, no not by the Case of Webb and Batchelor, where the Defendant justified in Trespass under the Warrant of a Justice of Peace for distraining of a Parson's Cattle, because he did not send out Labourers, &c. to amend the Highways: The Parson pretending that Clergymen were exempted from that Duty, it was there said, that if for that Reason the Warrant had been unduely made, yet the Officer had been excused in the Execution of it, because he is not Judge but to execute the Precept: But 'tis likewise said the Matter must be within the Jurisdiction of the Justice, which was so in that Case but not in this.

Hards 480.

Agreeable to this is a later Resolution in the Exchequer in the Case of Terry and Huntington: where in Trover the Defendant justified under a Warrant of the Commissioners of Excise, &c. and it was held by my Ld. Hale, That where a particular Jurisdiction exceeds its Authority, the Officer is liable, because all is void; for every limited Authority implies a Negative, viz. That they shall not proceed any otherwise than according to the Authority they have; but if they commit a Mistake in any Thing which is in their Power or Jurisdiction, it will be an Excuse to the Officer; but what the Justice did in the Case at Bar did far exceed his Power, for he is to cause one Penalty to be levied for one Offence, and he has sent out his Warrant to levy no less than 45 l. which is 18 forfeitures for one single Offence.

Suppose this Court should hold Pleas in Formedons, all the Proceedings would be void, because 'tis confined by Magna Charta to the Court of Common Pleas alone.

The Offence here is created by Act of Parliament, of which all People are to take Notice at their Peril, and to see that the Proceedings are pursuant to the Authorities and Powers thereby given.

6 H. 6. cap. 5.
5 Rep. 99. b.

The Statute of 6 H. 6. enacts, That no Person shall be spared towards the Repairs of Banks who have any Manner of Benefit by keeping them in Repair; the Commission of Sewers which is grounded upon this Statute is very extensive, viz. that the Commissioners may do therein according to their Discretion; but yet it has been held that they ought not to tax that Man alone whose Land adjoins to the River, but all others whose Lands are in Danger to be overflowed with Water; and therefore a Tax being laid upon a single Person, and a Distress taken for Non-payment,

is tortious, because it being given by Virtue of a general Law, the Officer at his Peril must examine and enquire into the Authority.

By this it appears that there is a Difference between Things done by a Justice of the Peace quatenus such, and by Virtue of his Authority, and those which are done by him by Virtue of an Act of Parliament, and of a particular restrained Power to him given thereby; for in the one Case the Officer must not examine but execute his Warrants, and in the other he must enquire into his Power, because 'tis by Virtue of the Statute that Obedience is given to his Authority.

Now tho' the Rule is true, viz. Qui jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est, yet that must be understood where the Judge hath a proper Jurisdiction; but here the Authority of the Justice was limited by the Act to grant his Warrant in a particular Case, of which he had no general Jurisdiction, and he having made a void and an illegal Warrant was therefore no proper Judge of the Matter, whose Authority is no more to be obeyed than that of a Stranger; for the Rule also is, *judicium non a suo judice datum nullius est momenti*. 9 Rep. 76. b.

To make this yet more plain, suppose the Justice had issued out his Warrant directed to the Defendant to levy 500 l. for this Offence, or to take and imprison the Offender during Life, certainly he had been a Trespasser if he had executed such a Warrant.

The Statute gives Power to the Justice to convict, but doth not make him a Judge either to declare the forfeiture, or to levy it, so that his granting a Warrant for that Purpose is purely a ministerial Act at the Instance of the Informer who is to demand it after Conviction, and if not paid, then to apply himself to the Justice for his Warrant to levy it.

So that upon the face of this Warrant the Constable is left without Excuse; for both the Acts being therein recited 'tis a sufficient Direction for him to look into them; and to take Care at his Peril not to exceed his Authority.

2. There are many other faults both in the Warrant, and in the Execution of it, viz. Costs are awarded when in truth the Party is to pay none till after Commitment, and the Defendant was not committed: So likewise the Demand of the forfeiture ought to be preblous to granting the Warrant; but that doth not appear; then it commands the Defendant to demand it of Crump the Plaintiff, and he demanded it of his Wife, when it ought to have been personally

sonally of him, and no Distress ought to have been made before such a personal Demand; but these Faults were not insisted on, only mentioned.

The Warrant therefore being illegal, and the Defendant acting under it (tho' he was an Officer) yet he is a Trespasser.

Econtra. Serj. Pemberton argued on the other Side, viz. That the Question was not whether the Justice of Peace had done well or not, nor whether his Warrant was regular; but admitting it not to be well grounded upon the Act, then the Question will be, Whether the Constable who is appointed to execute it is punishable for the Mistake of the Justice of the Peace?

Constables, Bailiffs and Sheriffs, are always favoured by Law in Execution of their Process, they have been encouraged by several Acts of Parliament, which direct them when sued for any Matter relating thereunto, that they should plead the general Issue and give the special Matter in Evidence, and if they have a Verdict, or the Plaintiff in such Suits is non-suited, they shall have treble Damages.

This seems highly reasonable, because the Execution of Process is the Life of the Law; and if Men should be prosecuted for any small Mistake it would obstruct the Execution of Justice by discouraging of Officers, and by great Delays in all Proceedings, which must necessarily follow if the Officer before he executes the Process must advise whether 'tis legal or not.

19 Rep.

This Question was long ago settled in the Case of the Marshalsea, there being then a solemn Judgment given, that a subordinate Officer shall be excused in the Executing of an erroneous Process, *Quia parere necesse est.*

'Tis true, there have been several Questions since that Judgment concerning the Execution of Process, all which depend upon this single Point, viz. Whether the Court out of which such Process did issue had an Original Jurisdiction of the Matter or Cause?

But it seems very hard that Officers who for the most part are illiterate Persons should take Notice whether that Court, out of which the Process issued hath a Jurisdiction of the Matter or not; and therefore since that Case of the Marshalsea, all subsequent Causes of that Nature have been governed by that Judgment.

2 Roll. Rep.
493.

To instance in some, viz. In Hillary Term 22 Jacobi an Action of Trespass was brought in this Court, for taking the Plaintiff's Goods, &c.

The Defendant pleaded, that the Earl of Southampton was seized in Fee, &c. and that he had a Court-Baron, &c. in which a Plaintiff was levied, and a Debt recovered against one Britton, and thereupon an Attachment was awarded against him directed to the Defendant being a Bailiff, who by Virtue thereof took the Goods out of the Custody of the Plaintiff to whom they were fraudulently conveyed by Britton on Purpose to deceive his Creditors.

To this an Exception was taken, because the Process was irregular, (viz) An Attachment first, which cannot be in a Court-Baron, for the Process there is Summons, Attachment, and Distress; yet it was held that the Court, having an original Jurisdiction of the Matter the mis-awarding of the Process shall not make the Officer guilty in executing of it,

So where an Action was brought in an inferior Court, and a third Person bound both his Lands and Goods by Recognizance that the Defendant should render his Body, &c. or that he would pay the Debt; and afterwards Judgment was had against the Defendant, and a Precept in the Nature of a Capias ad satisfaciend. was directed to the Bailiff, &c. to take the Defendant, and if he was not to be found, then to take him who entered into the said Recognizance: But notwithstanding that, and altho' one and the same Capias would not lie against the Principal and Bail at the same Time; and this appearing in the Precept it self to be contrary to Law, of which the Officer might have taken Notice, yet since that Court had an original Jurisdiction of the Cause, he shall not be punished for obeying an illegal Process. 2 Roll. Abr. 560.

Likewise in Sir Thomas Orby's Case who was High Sheriff of Lincoln, and one Hale a Justice of Peace did by Virtue of the Statute of 22 & 23 Car. 2. Cap. 20. discharge a Prisoner who was in Custody for 100 l. tho the Discharge was illegal, yet upon an Escape brought against the Sheriff in the Common Pleas, he was excused, because the Justice of Peace had a Jurisdiction and Authority by the Statute to discharge a Prisoner in such Manner as is therein directed, and tho' he had exceeded his Power, yet the Sheriff is not to be punished.

It appears therefore upon these Authorities, and many more which might be cited, that when Officers are punished for executing erroneous Process, 'tis always where the Court out of which it issueth hath not an original Jurisdiction of the Cause; so was the Case of Terry and Huntington in the Exchequer mentioned on the other Side, and so is Nichol's Case; the Reason of the Judgment in that last Case was, Mo. 480.

was, because the Churchwardens of one Parish had no Power to tax Inhabitants of another, and the Justices are only to confirm lawful Rates.

It must therefore be agreed that where the Court hath a Jurisdiction and acts illegally, the Officer shall be excused: If so, the Justice of Peace had a Jurisdiction in this Case, and therefore the Officer shall not be punished.

And that he hath a Jurisdiction appears upon the Frame and Construction of this Act.

- (1.) It prohibits selling of Wine in Glass Bottles.
- (2.) It imposeth a Forfeiture upon the Seller after a Time limited.

It creates a new Offence, and inflicts a Penalty, but it gives the Justices Power to convict, and send out their Warrants to levy it, so that they have Cognizance of the Cause.

It must also be agreed, That an erroneous Warrant of a Justice, &c. is within the same Reason with an illegal and void Process of any Court whatsoever; but when 'tis objected, That 'tis so when the Warrant is general, but not where Irregularities appear upon the Face of it, as there are two in this Warrant.

- (1.) 'Tis to levy 50 s. for every Bottle, when all is but one Offence.
- (2.) 'Tis to levy the Costs before the Penalty.

Ans. As to the first, it doth not appear that there is any Irregularity in it, because by the very Words and Meaning of the Act the Defendant is to pay 50 s. for every Glass Bottle in which he sold Wine, and if he sell it in 100 Bottles to several People those are several Offences, and non constat, but the 18 Bottles of Wine, for which he is convicted, were so sold at several Times, and not all at once.

'Tis plain that it was the Opinion of the Justice that the Offences were several; and it seems unreasonable that the Constable should have Power to controul his Judgment; he is not to dispute but submit.

Then as to the Costs, 'tis likewise plain they are given upon the Conviction, and not upon the Commitment of the Offender; however 'tis a little too nice to put the Constable upon examining that Matter.

It

It has been said, that the Statutes being recited in the Warrant, and the Defects appearing so plain therein, might be some Intimation or Direction to the Constable to look into these Laws; but admitting he doth, he may not understand them; and the other side will scarce allow a Constable to be a proper Judge of an Act of Parliament.

The Cause was adjourned, but the Plaintiff dying, no Judgment was given in it.

Peers *versus* Lucy. Trin. 6 Willi. Tertii, Rot. 178.

Memo-
randum.

War. ff. **M**emorand. quod alias scilt. Termino Paschæ ult præterit. coram Domino Rege & Domina Regina apud Westm. venit Tho. Peers Armiger per Johannem Lilly Attorn. suum & protulit hic in Curia dictorum Dom. Regis & Domine Regine tunc ibm. quandam billam suam versus Georgium Lucy Armigerum Edm. Lord Johannem Westerman Johannem Dickins Johaunem Hawkes juniorem & Ricum. Perkins in Custodia Mar. &c. de plito transgr. & sunt pleg. de prof. scilt. Johannes Doe & Ric. Roe quæ quidem Billa sequitur in hæc verba scilt. Warr. ff. Thomas Peers Ar. queritur de Georgio Lucy Ar. Edmundo Lord Johanne Westerman Johanne Dickins Johe. Hawkes jun. & Rico. Perkins in Custod. Mar. Marefc. Dom. Regis & Dnæ. Regine coram ipsis Rege & Regina existen. de eo quod ipsi decimo septimo die Aprilis Anno Regni Domini Wil-

lielmi & Dom. Mariæ nunc Regis & Regine Angliæ &c. sexto vi & Armis &c. clausum ipsius Thomæ Peers voc. Cliftenbank apud paroch. de Alveston in Com. Warr. præd. freger. & intraver. & herbam ipsius Thomæ Peers in eodem clauso ad tunc crescen. ad valentiam quadraginta solidorum pedibus suis ambulando conculcaver. & consumpserunt necnon de eo qd. ipsi postea scilicet eisdem die & Anno supradictis vi & Armis &c. in sepeparali piscar. ipsius Thomæ Peers in Rivo de Avon in paroch. de alveston præd. in Com. Warr. præd. piscat. fuerunt & pisces de piscaria sua præd. videlt. decem mille Rubilliones Anglice Roaches decem mille apuas Anglice Daces quinque mille percas Anglice Perches decem mille Anguillas Anglice Eels quinque mille lucios Anglice Pikes & viginti mille gobiones Anglice Budgeons ad valentiam Centum librarum ad tunc & ibm.

Clausum
fregit.

Et in se-
parali
piscaria
piscat.
fuer.

z z z

invent.

Count in
Trespas.

invent. ceper. & asportaver. & alia enormia ei adtunc & ibidem intulerunt contra pacem dictorum Dom. Regis & Dnæ. Regina nunc & ad damnum ipsius Tho. Peers ducent. librarum & inde producit sectam, &c.

Imparlance.

Et modo ad hunc diem scilt. diem veneris prox. post Crast. sanctæ Trinitatis isto eodem Termino usque quem diem præd' Georgius Edmund. Joh'es Westerman Jo'hes Dickins Jo'hes Hawkes & Richard' Perkins habuer. licentiam ad billā p'd. interloquend. & tum ad respondend. &c. coram Domino Rege & Domina Regina apud Westm. venit tam præd. Thomas per Attorn. suum præd. quam præd' Georgius Edmundus Joh'es Westerman Joh'es Dickins Joh'es Hawkes & Ricus per Carolum Ballet Attorn. suum & iidem Georgius Edm' Joh'es Westerman Joh'es Dickins Joh'es Hawkes & Richardus defend. vim & injur. quando &c. Et quoad venire vi & armis seu quicquid quod est contra pacem dictorum Dom. Regis & Domina Regina nunc necnon totam transgres. præd. præter fraction. & intrationem clausi præd. & herbam præd. pedibus ambulando conculcation. & consumption. in narratione præd. superius fieri supposit. dicunt quod ipsi non sunt inde culpabiles & de hoc ponunt se super patriam & præd. Tho. inde fil'ter &c. Et quoad

Quoad venire vi & armis non culp.

fraction. & intration. clausi præd. & herbæ præd. pedibus ambulando conculcation. & consumptionem iidem Georgius (and all the Defendants) dicunt quod prædict. Thomas Peers actionem suam prædict. inde versus eos habere seu manutenere non debet quia dicunt qd. diu ante p'd. tempus quo supponitur transgress. illam fieri scilt. primo die Decembris Anno tertio Regni Domini Edwardi nuper Regis Angliæ sexto, &c. quidam Johannes Comes Warwick seisit. fuit de & in manerio de Hampton præd. cum pertin. in prædict. Com. Warr. unde una acra terræ aqua cooperta in parochia de Alveston præd. in Com. præd. prox. & contigue adjacen. præd. clauso in quo supponitur transgres. præd. fieri est & prædict. tempore quo &c. necnon a tempore cujus contrar. memoria hominum non existit fuit parcel. in Dominico suo ut de feodo prædictq; nuper Rex Edwardus sextus adtunc seist. fuit de & in clauso præd. in quo &c. in Dominico suo ut de feodo in jure Coronæ suæ Angliæ quodq; præd. comite de manerio præd. cum pertin. unde &c. sic ut præfertur seist. existen. idem Comes & omnes illi quorum statum idem Comes tunc habuit de & in manerio præd. cum pertin. unde &c. a tempore cujus contrar. memoria hominum non existit usi fuer.

Et quoad the Tres. pass in the Close.

Seisin pleaded in the Earl of Warwick.

E. 6. seist. in Fee jure Coronæ.

* It should
have been
tanquam
ad mane-
rium pre-
dict. spe-
ctan.

* It should
have been
us fuer.
& consu-
ever. in-
trare.

Comes
Warr.
per In-
dentur.
irrotulat.
concessit
E. 6. ma-
nerium
præd.

fuer. & consuever. habere ne-
cessarinmeasiamen'tsequen'pro
caption. piscium in aqua præ-
dict. existen. videlt. pro se &
servis suis de tempore in tem-
pus & ad omnia tempora se-
sionabilia piscacon' in aqua
præd. ad libita sua in clauso
præd' in quo &c. * intrare &
retes & al' ingen' necessar.
pro caption. piscium in aqua
illa existen. ibm. prope Ri-
pas aquæ præd' aperire & in
aquas præd. dimittere & in
aqua illa & extra aquas illas
trahere pro necessar. capiend.
pisces in aqua præd' existen'
prædictoq; nuper Rege Edwar-
do sexto de præd. clauso in
quo &c. sic ut præfertur seit.
existen' præfatoque Com' War'
de præd. manerio cum pertin'
Unde &c. in forma præd. seit'
existen' idem Comes postea &
ante præd' tempus quo &c.
scilt' 24 die Decembris Anno
Regni dicti nuper Regis tertio
apud Westm' in Com. Midd'
per quandam Indenturam in-
ter ipsum Comitem ex una par-
te & dictum nuper Regem ex
alteia parte factam sigillo ipsi-
us comitis sigillat. & in Curia
Cancellariæ dictorum Dom.
Regis & Dominæ Reginæ nunc
apud Westm. præd. in Com.
Midd. præd. de recordo irro-
tulat. remanen' cujus dat. est
eisdem die & Anno concessit
dicto nuper Regi inter alia
manerium præd' cum perin.
Unde &c. hend. & tenend. mane-
rium illud cum pertin. Unde &c.

eidem nuper Regi hæred' &
successoribus suis in perpetuum
per quod idem nuper Rex in
præd' manerium cum perin' Un-
de &c. intravit & fuit inde
seisit. in Dominico suo ut de
feodo in jure Coronæ suæ
Angliæ præfatoq; nuper Rege
Edwardo sexto sic inde de
prædict. clauso in quo &c.
seit' existen' postea & ante
tempus præd' quo &c. apud
paroch. de Alveston præd.
sic inde seit. obiit per cujus
mortem præd. manerium cum
pertin. Unde &c. Et clausum
præd' in quo descendebat Do-
minæ Mariæ nuper Reginæ An-
gliæ ut sorori & hæred. dicti nu-
per Regis Edwardi sexti per
quod eadem nuper Regina Ma-
ria in præd. manerium cum per-
tin. Unde &c. & clausum præd.
intravit & fuit inde seisit. in Do-
minico suo ut de feodo in jure
Coron. suæ Angliæ Et sic inde
seit' existen' eadem nuper Regi-
na Maria diu ante præd. tem-
pus quo &c. apud Alveston præd.
cepit in virum Philippum tunc
Regem Hispanicum per quod
idem Philippus ut Rex An-
gliæ in jure ipsius nuper Regi-
næ & eadem nuper Regina seit.
fuer. de & in præd' manerio cum
pertin' Unde &c. & præd' clauso
in quo &c. in dominico suo ut
de feodo in jure Coronæ suæ
Angl. Et sic seit. existen. iidem
nuper Rex Philippus & nu-
per Regina Maria postea &
ante præd' tempus quo &c.
scilt. 12 die Junii Annis Reg-
norum

Who en-
tered and
was sei-
sed in
Fee jure
Coron.

Rex obiit
seisit.

And the
same de-
scended to
Queen
Mary,
who en-
tered and
was sei-
sed.

*Grant by
Letters
Patent.*

norm suorum Angliæ tertio & quarto apud Westm. præd. in Com. Midd. per Literas suas Patentes sub magno sigillo suo Angliæ sigillat. geren. dat. apud Westm præd. eisdem die & Anno quas præd. Georgius &c. hic in Curia proferunt concesser. cuidam Thomæ Lucy Armigero inter alia præd. manerium cum pertin. unde &c. ac omnia & singula vias commoditates emolumenta & hereditamenta quæcunque in præd' paroch. de Hampton Episc. in dicto Com. Warr. ac alibi ubicunque in eodem Com. dicto manerio de Hampton Episc. unde &c. seu alicui parcel. inde quoquo modo spectan' sive pertin. aut ut membr. partes vel parcel. ejusdem manerii unde &c. habit. cognit. accept. usitat. reputat. dimiss. seu occupat. existen. aut cum eodem vel aliqua parcel' inde usitat. vel gavis. adeo plene libere & integre ac in tam amplis modo & forma prout aliqua persona quæcunque ante tunc manerium præd. cum pertin. unde &c. unquam habuit tenuit vel gavis. fuit seu habere tenere vel gaudere debuit hend. & tenend. eidem Thomæ Lucy Hæred. & assign' suis in perpetuum per quod idem Thomas Lucy in præd. manerium cū pertin. unde &c. postea & diu ante præd. tempus quo &c. intravit & fuit inde seit. in dominico suo ut de Feodo præfatoque Tho-

ma Lucy de manerio præd. cum pertin. unde &c. ut præfertur seit existen. idem Thomas postea & diu ante præd. tempus quo &c. apud paroch. de Alveston præd. sic inde seit. obiit per cujus mortem manerium præd' cum pertin' unde &c. descendebat cuidam Thomæ Lucy militi ut filio & hæredi præd. Thomæ Lucy patris per quod idem Thomas Lucy filius postea & ante præd. tempus quo &c. in præd. manerium cum pertin. unde &c. intravit & fuit inde seit. in dominico suo ut de feodo eodemque Thoma Lucy filio sic de manerio præd' cum pertin. unde &c. seit. existen' idem Thomas Lucy postea & diu antea præd' tempus quo &c. apud paroch. de Alveston præd' sic inde seit' obiit per cujus mortem manerium præd. cum pertin' unde &c. descendebat cuidam Thomæ Lucy militi ut filio & hæredi præd' Thomæ Lucy militis patris ipsius per quod idem Thomas Lucy filius postea & ante præd' tempus quo, &c. in manerium præd' cum pertin. intravit & fuit inde seit' in dominico suo ut de feodo eodemq; Thoma Lucy filio sic de manerio prædict. cum pertin. unde &c. seit. existen. idem Thomas Lucy filius postea & diu ante præd' tempus quo &c. apud paroch. de Alveston prædict. sic inde seit. obiit per cujus mortem manerium præd' cum pertin. unde &c. descendebat

Dying seised, and a Discent.

And another dying seised.

Another dying seised.

*The
Grantee
entred and
was seised.*

debet cuidam Roberto Lucy ut filio & hæredi ejusdem Thomæ Lucy per quod idem Robertus Lucy postea & diu ante præd. tempus quo &c. in præd. manerium cum pertin' unde &c. intravit & fuit inde seifit. in Dominico suo ut de feodo eodemque Roberto sic de manerio præd' cum pertin' unde &c. seifit. existen. idem Robertus Lucy postea & diu ante præd' tempus quo &c. apud Alveston præd' sic inde seifit' obiit sine hærede masculino de corpore suo per cujus mortem manerium præd' cum pertin. unde &c. descendebat cuidam Bridget' Lucy ut filia unica & hæred. prædict. Roberti Lucy per quod eadem Bridget' postea & diu ante præd. tempus quo &c. in manerium præd. cum pertin. unde &c. intravit & fuit inde seifit. in dominico suo ut de feodo prædictaq; Bridgetta sic de manerio prædict' cum pertin' unde &c. seifit. existen. eadem Bridgetta postea & diu ante præd. tempus quo &c. inde feoffavit quendam Richardum Lucy Armigerum patrum ipsius Brigettæ habend. & tenend. eidem Richardo & heredibus & assign' suis in perpetuum per quod idem Richardus fuit seifit' de manerio præd. cum pertin. unde &c. in dominico suo ut de feodo præfatoq; Richardo Lucy sic inde seifit. existen. idem Richardus postea & diu ante præd. tempus quo &c. apud paroch.

de Alveston præd' sic inde seifit. obiit per cujus mortem manerium præd' cum pertin. unde &c. descendebat cuidam Thomæ Lucy Armigero ut filio & hæredi ejusdem Richardi Lucy per quod idem Thomas Lucy postea & diu ante præd' tempus quo &c. in manerium præd. cum pertin. unde &c. intravit & fuit inde seifit. in dominico suo ut de feodo prædictoque Thoma Lucy sic inde seifit. existen' idem Tho. Lucy Postea & diu ante præd' tempus quo &c. scilt. decimo die Novembris Anno Regni Domini Caroli nuper Regis Angliæ secundi tricesimo sexto apud paroch. de Alveston prædict. debita legis forma condidit testamentum & ultimam voluntatem suam in scriptis & per eandem devisavit manerium præd' cum pertin' unde &c. quibusdam Johanni Mordant Baronetto Roberto Wheatley Armigero & Edwardo Willee Gen' hærd. & assign. suis in perpetuum posteaq; & diu ante præd. tempus quo &c. idem Thomas Lucy apud Alveston præd. sic ut præfertur seifit. obiit post cujus mortem & diu ante præd' tempus quo &c. præd. Johannes Mordant Robertus Wheatly & Edwardus Willee virtute devisationis præd' in manerium præd' cum pertin. intraverunt & fuerunt inde seifit. in dominico suo ut de feodo prædictoq; Johanne Mordant Roberto Wheatley & Ed-

Dying seifed, and a Discent.

Died without Issue-male,

And descended to another,

Who enfeoffed A. B.

And made his Will, and devised the Premises in Fee.

Devises entered by virtue of the Devise.

*And en-
feoffed
A. B.*

*Who died
seised.*

*A De-
scend to
his Heirs.*

Edwardo Wallee sic inde seisit' existen. iidem Johannes Mordant Robertus Wheatley & Edwardus Willee postea & diu ante præd' tempus quo &c. scilt. primo die Julii Anno Regni Domini Jacobi nuper Regis Angliæ secundi primo inde feoffaver. quendam Davenport Lucy Armigerum habend' & tenend eidem Davenport Lucy hæred. & assign. suis in perpetuum per quod idem Davenport fuit seisit' de manerio præd' cum pertin' unde &c. in Dominico suo ut de feodo præfatoq; Davenport sic inde seisit. existen' idem Davenport postea & diu ante prædict. tempus quo &c. apud paroch. de Alveston præd. sic inde seisit. obiit sine aliquo exitu de corpore suo exenn. per cujus mortem manerium præd' cum pertin. unde &c. descendebat præd. Georgio Lucy ut fratri & hæredi præd. Davenport per quod iidem Georgius postea & ante præd' tempus quo &c. in manerium prædict' cum pertin. unde &c. intravit & fuit & adhuc est inde seisit. in Dominico suo ut de feodo per quod idem Georgius in jure suo proprio & præd. Edmundus Johannes Westerman Johannes Dickins Johannes Hawkes & Richardus ut servien. ipsius Georgii & per ejus præcept. præd' tempore quo &c. existen' tempore sesionabil. piscationis in aqua præd' in clausum præd.

in quo &c. prope ripas aquæ præd. intraverunt & ibidem re-tes præd. Georgii pro necessa-ria captione piscium in aqua illa existen' aperuerunt & in aquas præd. demiserunt & in aqua illa & extra aquas illas traxerunt & perinde herbam præd. in eodem clauso adtunc crescen' pedibus suis ambulando conculcaverunt & consumpserunt tam parvum quam potuerunt dampnum ibidem facien' prout eis bene licuit quæ sunt eadem fractio & intratio clausi prædict. in quo &c. & herbæ ibidem pedibus ambulando conculatio & consumptione unde prædict' Thomas Peers superius inde versus eos queritur Et hoc parat. sunt verificare unde pet' judicium si præd. Thomas actionem suam præd. inde versus eos habere seā manutenere debeat &c.

Et præd. Thomas quoad placitum ipsorum Georgii Edmundi Johannis Westerman Johannis Dickins Johannis Hawkes & Richardi quoad fractionem & intration. clausi prædict' & herbæ præd. pedibus suis ambulando conculcation' & consumptionem modo & forma præd. superius placitat. dicit quod ipse per aliqua per prædict' Georgium Edmundum Johannem Westerman Johannem Dickins Johannem Hawkes & Richardum placitando allegat. ab actione sua prædict. inde versus eos habend' præ-

*And the
Defen-
dants en-
tered as his
Servants.*

*Justise
the Tres-
pass.*

*Que est
eadem
fractio &
intratio.*

*The
Plaintiff
demurs.*

præcludi non debet quia protestando quod præd. Georgius Lucy non fuit seisit. de præd. una acra terræ aqua cooperta in paroch. de Alveston præd' in Com. præd. in Dominico suo ut de feodo protestandoque etiam quod easiam. præd. in placito præd. superius mentionat. non est necessar. easiam. pro captione piscium in aqua præd. pro placito tamen idem Thomas dic. quod placitum prædictum per prædict. Georgium Edmundum Johannem Westerman Johannem Dickens Johannem Hawkes & Ricard. modo & forma præd. superius placitando allegat. materiaque in eodem content. minus sufficien. in lege existunt ad ipsum Tho' ab actione sua præd' versus præfat. Georgium Edmundum Johannem Westerman Johannem Dickens Joh'em Hawkes & Ricardum habend. præcludend, quodq; ipse ad placitum ill. modo & forma p'd. placitat. necesse non habet nec p legem terræ tenetur aliquo modo respondere Et hoc parat. est verificare unde pro defectu sufficien. respons. in hac parte idem Thomas pet. Judicium & dampna sua occasione transgr. ill. sibi adjudicari, &c.

*And the
Defen-
dants
join in
Demur-
rer.*

Et præd Georgius Edmundus Joh'es Westerman Joh'es Dickens & Ricardus dicunt qd' pl'itum præd. quoad fraction. & intration. clausi præd. & herbæ p'd. pedibus ambulando

conculcation. & consumption. per ipsos Georgium Edmundum Johannem Westerman Johannem Dickens Joh'em Hawkes & Richardum modo & forma præd. superius plitaddo allegat. materiaque in eodem content. bon. & sufficien. in lege existunt ad præd. Thomam ab actione sua p'd. inde vers' ipsos Georg' Edmundum Johannem Westerman Johannem Dickens Joh'em Hawkes & Ricum. hend. præcludend. quod quidem pl'itum materiamq; in eodem content. idem Georgius Edmundus Joh'es Westerman Johannes Dickens Johannes Hawkes & Ricus. parat. sunt verificare & probare prout Curia &c. Et quia præd. Thomas ad pl'itum ill. non respond. nec ill. hucusque aliquo modo dedit iidem Georgius Edmundus Johannes Westerman Joh'es Dickens Johannes Hawkes & Ricus. ut prius petunt judicium & quod idem Thomas ab actione sua p'd. versus ipsos Georgium Edmundum Joh' Westerman Joh'em Dickens Johannem Hawkes & Ricum hend' præcludatur sed quia

*Continu-
ance.*

Aaa

de

Ven fac.
awarded
tam ad
triand.
exitum
quam ad
inqui-
rend. de
dampnis.

de iudicio suo de & super
præmissis illis audiend. eo
quod Curia Domini Regis &
Dominæ Reginæ nunc hic in-
de nondum &c. & quoad tam
ad triaco. exit. præd. inter par-
tes præd. superius junct. per
patriam triand. quam ad in-
quirend. quæ dampna idem
Thomas sustinuit occasione
transgressionis præd. unde par-
tes præd. superius in iudicio

Curia se posuer. si contingat
iudicium pro eodem Thoma
versus præfat. Georgium Ed-
mundum Joh'm Westerman
Joh'em Hawkes & Ricum. in-
de reddi ven. inde jurat. coram
Domino Rege & Domina Re-
gina apud Westm. die prox.
post Et qui nec &c. ad recog.
&c. quia tam &c. idem dies
dat. est partibus præd. ibidem
&c.

Peers versus Lucy & al.

TRESPASS for the Breaking and Entering the Close
of the Plaintiff, and Treading down of his Grass,
and Fishing in his several Fishery.

The Defendants, as to the Force and Arms, plead
Not guilty; and as to the Breaking and Entering of
the Close, and Treading the Grass, they say that John
Earl of Warwick. Anno 3 Ed. 6. was seised in fee of
the Manor of Hampton, wherof one Acre covered
with Water was Parcel, and likewise contiguous to
the said Close, that the said Earl and all those
whose Estate he had in the same Manor Time out of
Mind, were accustomed to have a necessary Easement for
themselves and Servants to catch fish in the said Wa-
ter at several Times, and for that Purpose to enter
into the said Close and spread Nets, &c.

That afterwards the said Earl granted this Manor
to King Edward the sixth in fee, after whose Death
both the said Manor and Close descended to Queen
Mary as his Sister and Heir, who married Philip King
of Spain, and so they became seised thereof, &c. who by
Letters Patents granted the said Manor to Thomas
Lucy in fee, with all Ways, Emoluments, Commodities
and Hereditaments thereunto belonging, &c. in as full
and ample Manner as any Person before had enjoy-
ed the same, and so derives a Title to himself from the
said Thomas Lucy, and justifies in his own Right, and the
other

other Defendants as his Servants, and by his Command for entring into the said Close, and spreading of his Nets, and casting them into the Water for the necessary catching of fish, &c.

The Plaintiff by Protestation replies, that the Defendant was not seised in Fee of that one Acre covered with Water, and that the Easement which he had pleaded was not a necessary Easement for catching of fish, and then demurred generally to the Plea, and the Defendants joined in Demurrer.

Those who argued for the Plaintiff insisted, that this Plea was not good, either as to the Matter or Form of pleading.

First, As to the Matter; for probably this Prescription might have been good, if the Defendant had derived to himself a Title from the Earl of Warwick; but he being seised of the Manor, and the King of the Close, and having granted the Manor to the King, the Easement by this means was extinguished, because 'tis inconsistent for one Person to have both a general and particular Property in the same Thing at the same Time.

Many Cases were cited to prove that this Easement was destroyed by Unity of Possession.

As in Trespass, where the Defendant justified for a Way belonging to his House in D. to go to a Wood in C.

The Plaintiff replied, that one N. in the Time of King Richard the first, &c. was seised both of the Land through which the Defendant claimed the Way, and likewise of the Wood; and tho' in 3 H. 6. 31. it was a Question whether this Way was extinguished by Unity of Possession; yet Brook in abridging of the Case, seems to be clear of Opinion that it was extinguished.

So Unity of Possession of a Mill and Water-course to which a Way is appendant, and of that Land over which the Way is, will extinguish the Way it self.

So in the Case of Surry and Piggot, it was agreed that all private Ways are extinguished by Unity of Possession; but when the Thing is of necessity and essential to the Grant, in such Case, if there is once an Unity of Possession, it shall revive again; as if there is a Water-course to a House through the Ground of another Person, that is of Necessity, and shall not be extinguished by Unity of Possession.

This is an Easement in the Nature of a Way, and if a Way can be extinguished, why not this? Especially when 'tis not pleaded, that it was necessary for catching of fish; 'tis only said it was a necessary Easement, &c. which is a very insignificant Expression, 'tis neither a Grammar Word, or a Word of Art and Skill; it should

Tit. Chimin.
pl. 13.

Br. Abr. tit.
Nuisance
pl. 11.
1 Roll. Abr.
935.

3 Bulst. 340.
Poph. 166.
Litch. 153.
Benl. 184.
2 Sid. 39, 111.
Hob. 131.

have been, that they consueverunt habere quendam viam or quodam privilegium sive libertatem intrare, &c. And tho' 'tis an insensible Word, it cannot be rejected as Surplusage upon the Statute of Demurrers, because 'tis the Gift of the Action; but if that Sentence should be rejected, then 'tis ut fuerunt & consueverunt clausum intrare, which may be with Leave.

Neither is it revived by the Grant of all Ways, Emoluments and Hereditaments, &c. to Thomas Lucy, Ancestor of the Defendant, for the only Word which may give any Colour to such an Opinion, is the Word Hereditaments, but that must be intended only of such as were in being at the Time of the Grant made.

Yel. 189.
1 Brownl.
173.
2 Cro. 253.
Cro. Eliz.
794.
contra.

To prove that it was revived by such general Words the Case of Marshal and Hunter was cited as an Authority full to the Purpose, which was thus, viz. A Copyholder for Life having Common, &c. purchased the Fee of his Copyhold, which was granted to him by the Lord cum pertinentiis, and it was resolved, that by the Unity of Possession his Common was destroyed, and that it was not revived by these general Words cum pertinentiis.

(2.) The second Point was not much insisted on, which was, that the Plea was insufficient, as to the Manner of Pleading: for 'tis said that the Earl of Warwick 3 Ed. 6. was seised in Fee of the Manor of Hampton, &c. and of one Acre of Ground Parcel thereof covered with Water, and then prescribes that he and all those, &c. used to have a necessary Easement, but doth not say tanquam ad manerium præd. spectan. and therefore have not claimed it as an Easement belonging to the Manor.

Econtra. Those who argued on the other Side agreed the Cases before cited to be Law, viz. where any Matter of Interest or Charge is claimed upon Mens Estates, as Rents, Commons, &c. such are always extinguished by Unity of Possession, and never revived.

But these Cases do not come up to the Matter now in Question, because there is a great Difference between Matters of Charge and Easement in all Cases, excepting only that of a Way which is of Necessity; and this is the very Difference made in all our Books.

Such were all the Cases before mentioned in the Behalf of the Plaintiff, and such was the Resolution in Surry and Piggots Case where all the Authorities are quoted, viz. it was an Action on the Case for stopping of a Water-course which used to run from one Place to another, and which

filled

filled the Pond of the Plaintiff with Water for the necessary watering of his Cattle; there the Water was held to be a necessary Easement; and tho' there was an Unity of Possession, yet for that Reason Judgment was given, that the Water-course was not extinct.

The Defendants in like Manner by pleading have shewed this to be a necessary Easement, and the Plaintiff hath confessed as much by his Demurrer, for they have no way of catching Fish, but as set forth in this Plea.

(2.) But if this Easement was once extinguished by Unity of Possession, yet the Grant of the King and Queen de novo to Thomas Lucy revives it; for 'tis granted to him tam amplis modo & forma prout aliqua persona quæcunq; antetunc manerium &c. habuit, which are relative Words, and give new Life to this Easement.

Cro. Eliz.
570.

As in Trespas, the Defendant pleaded that B. was seized of the Place where, &c. in Fee, and that F. was seized of a House, and so prescribed to have Common appurtenant in the Place where &c. and that F. made a feoffment of his House to B. who made a Lease thereof to the Defendant with all Commons thereunto appertaining, or occupied or used with the said House; it was adjudged, that by the Unity of Possession the Common was extinguished, yet by both those Words a good Grant was made of a new Common.

9 Rep. 26. a.
2 Cro. 253.
contra.
Cro. Eliz.
794.
2 And. 161.
Hob. 131.

So where a Copyhold Messuage escheated to the Lord where the Copyholder had Common by Prescription in sixty Acres of the Demesnes, and the Lord granted all Commons to the said Messuage belonging or let with the same. It was adjudged, that by these Words the Grantee had a Common in the said sixty Acres, tho' it was once destroyed by Unity of Possession.

As to the Objection, that the Words necessary Easement, are insignificant, and neither Words of Art or Skill, that may receive this Answer, viz. The Word Easement is known in the Law; 'tis defined in the Terms thereof, 'tis a Genus to several Species of Liberties which one Man may have in the Soil of another, without claiming any Interest in the Land it self; 'tis used in * Gateward's Case, where it was held to be a good Custom for an Inhabitant of a certain Parish to have a Way over another Man's Ground, either to Church or to the Market, because 'tis an Easement and no Profit: 'Tis used also by my Lord * Hobert, who makes a Difference between Interests and Profits, &c. such as Rents and Commons, &c. and Easements, such as Lights, Air, &c. the last of which, tho' they may be destroyed or extinguished

* 6 Rep. 52.
25 Ed. 4. 29.
Cro. Car.
419.

* Hob. 131.

guished for a Time by Unity of Possession (for a Man may do what he pleaseth with his own) yet if no Alteration is made thereof when 'tis in one Hand, upon the Dividing it again the Interest and Right to such Easement doth revive.

* Dyer 72a.

My Lord * Dyer useth this Word, where he tells us, that Lessee for Life or Years, or Tenant at Will, or an Inhabitant of a Parish who is Tenant at Will, cannot prescribe to a Common in their own Names, because of the Meanness of their Estates and Capacity, but they may prescribe to be exempted from Toll, or to have a Way to Church over another Man's Ground, because such are only Easements.

'Tis a Word also used in pleading in almost all the Books of Entries, as in Co. Entr. 19. Robinson's Entries 18 Winch. 46. Vidian 6, 28. Hern. 74. and 'tis mentioned also in 2 Brownlow, Case 24.

Curia. The Word Easement is known in Law, but here the Thing it self is set forth, viz. to catch fish &c. and certainly no Instance can be given of a Prescription for such a Liberty by such a Word or Name; therefore the Defendants were directed to set the Prescription right, and try the Merit of the Cause.

Rex & Regina *versus* Armstrong.

1 Vent. 304.
3 Mod. 47.

A Motion being made to reverse an Outlawry in Treason, there being a Writ of Error brought, and the Error assigned, viz. that it doth not appear where the Hustings were held, for 'tis at a Court of Hustings, &c. omitting pro Civitate London.

The Court inclining to reverse it for this Error, one of the Judges objected, that there ought to be a Scire fac. to the Lords mediate and immediate before the Outlawry should be reversed.

To which it was answered, that it was not necessary in Treason, because the Forfeitures do not belong to them, but to the King; whereupon the Outlawry was reversed.

Anonymus.

Anonymus.

A Motion was made for a Prohibition to the Ecclesiastical Court of London, for calling of a Woman *Whore*, upon a Suggestion that the Words were actionable there by Custom of the Place. 1 Vent. 352
1 Show. 131.

But the Court would not grant a Prohibition without Oath made, that if any such Words were spoken, it was in London and not elsewhere. Farell. 29.

Rush versus Tory.

In a Judgment upon a mutatus, the Bill appeared to be filed on a certain Day, viz. Memorand. quod die Veneris, &c. which Day happened to be before the Debt became due.

This was assigned for Error upon a Writ of Error brought to reverse this Judgment; and now the Court was moved in Behalf of the Plaintiff to make the Memorand. of another Day, so that it might agree with the Judgment; but it was denied. 5 Mod. 286.

Jones versus Comitem Bath.

A Trial at Bar was appointed in this Cause on Wednesday the 12th of November; and the Day before the Trial the Plaintiff moved to put it off, because he wanted a Witness to prove a Deed.

The Court denied the Motion, thereupon the next Day the Attorney refused to bring in the Writ, it being only a Contrivance of him to prevent a Nonsuit.

But the Court ordered the Roll to be brought in, that they might take Notice there was such a Writ; and the Counsel of the Defendant informed them that my Lord Chief Justice Hale had committed an Attorney for the like Practice, which was likewise done now.

Rex

Rex & Regina *versus* St. John's College in Oxon.

UPON an Alias Mandamus to admit Mr. King to the Place of a Scholar in the College, being nominated thereunto by the Mayor, &c. of Bristol, to whom the Right of Nomination pro hac vice pleno jure did appertain, upon the Resignation of one Baskerville.

The Substance of the Return was, viz. That the College was founded by Sir Thomas White; that the Bishop of Winton for the Time being, was the local Visitor thereof; that Baskervill resigned, and that after the Nomination of Mr. King by the Mayor, &c. of Bristol, the President of the said College and ten Senior Fellows thereof assembled to consider of his Qualifications, and for that it was their Opinion upon Proof of several Facts, inconsistent with good Manners, and committed by Mr. King, he was by them refused as incapable of the Scholarship, and therefore they admitted another.

It was argued in his Behalf, that there was nothing in this Return to hinder this Court from granting farther Process to compel the College to admit Mr. King, because the Reason of their Refusal was not positive but general; and therefore 'tis impossible to try the Falshood of it in a collateral Action, because there is no fact returned.

1 Mod. 82.

In some Cases a general Return hath been held sufficient, but then it was fortified by something of Credit, as the Return in Daniel Apleford's Case viz. that he was convicted of enormous Crimes, and nothing in particular set forth; but because the Visitor had given Sentence, therefore a Mandamus was denied, which would not have been if the Mandamus had been pray'd before Sentence.

2 Roll. Abr.
113, 218.

So if the High Commission-Court by Virtue of their Letters Patents had deprived a Minister for divers Contempts to his Ordinary, not shewing any in particular; this hath been held good, because before the Statute of 1 Eliz. c. 1. which first gave them Authority, the King might grant Commissions to Persons to proceed according to the Ecclesiastical Law, and they having proceeded against a Spiritual Person, and by an Ecclesiastical Censure, tho' not according to the Statute, the Court will give Credit to their Sentence without shewing a particular Cause.

The

The Return is, that having refused Mr. King they did choose another, and before the first Writ of Mandamus came to them, they did admit the Person so chosen; but if Mr. King was refused without Cause, then they had no Power either to choose or admit another.

That that part of the Return which concerns the local Visitor is very immaterial, viz. That if Mr. King hath any Wrong done him he may appeal to the Visitor, and therefore this Court should not interpose, untill his Sentence is given.

For tho' probably the Right may be within the Jurisdiction of the Visitor, yet this Court may compel an Admittance to entitle the Person to a Right, for till then he hath none, and therefore it cannot be reasonable to send him to the Visitor.

But he hath no Jurisdiction in this Case for two Reasons.

(1.) Because he is only a private Judge appointed by the Founder, or the Law, to determine Offences against the Laws of the College or Place where he is Visitor, so that his Power extends only over Collegiate Persons and Things; but Mr. King is not of the College before Admittance.

(2.) His Power is also to determine Rights upon the Statutes of the College, but not upon Grants, which must be tried at the Common Law; and the Question here arises upon the Grant of the Founder to the City of Bristol.

If there is any Cause or Truth in this Return, the College may turn him out after he is admitted, for the very same Reasons they now refuse to admit him; but if he is not to be admitted at all, then the Right of the City of Bristol is wholly defeated.

'Tis as reasonable that this Court should grant a Mandamus to the College to admit Persons, as to grant such Writs to Corporations, or to a particular Company to make a Man free thereof, or to the Ordinary to compel him to grant Administration to the next of Kin; for where the Cases are alike, the Remedies should also concur. Adjournatur.

Rex & Regina *versus* Lawrence.

THIS was a Writ of Error to reverse an Attainder, &c. The Error assigned was, viz. The Enquiry is on the Behalf of the King for the County, &c. and they are sever'd in the Judgment, which was, pro Domino Rege & pro corpore Com. It should have been, pro Domino Rege pro corpore Comitatus, and the Particle Et should have been omitted; for which Cause it was reversed.

5

DE

D E

Term. Sanct. Hill.

Anno 6 W. III. Regis in B. R. 1694.

Cradock *versus* Radford.

NOTA, a Judgment of 20 Years standing came this Term to be revived by Scire fac. against the Heir and Certenants, it was quod præd. Thomas recuperet, instead of præd. Arthurus; it was prayed that the Roll might be brought into Court and amended, because it was only the fault of the Clerk.

The like Amendment was in the Common Pleas, Mich. 33 Eliz. where the Judgment was quod idem Johannes sit in misericordia instead of Thomas. Cro. Eliz. 299, 864, 609. contra Roll. Abr. 201.

So where the Judgment was, quod præd. Georgius capiatur, it should have been Elias; for where the Parties are named right in the Record, and the Name of one of them misplaced or mistaken for the other, 'tis reasonable, that the Record should be amended to entitle the Plaintiff to an honest Debt. Cro. Car. 594

It hath been ruled to be amended in a much stronger Case, viz. the Misprision of the Clerk hath been in the very Point of the Judgment, as in Ejectment the Plaintiff had a Verdict for a Messuage, 10 Acres of Meadow, and 13 of Pasture; now there was no Land in the Verdict, and less 2 Cro. 632. Palm. 258. Roll Abr. 201, 162.

B b b 2

Meadow

8 H. 6.
cap. 12.

Meadow and Pasture than in the Judgment, yet it was amended upon the Statute, for the Verdict is to guide the Judgment, and so it ought to have been entered accordingly.

Cro.
Eliz 609.

But on the other Side this was opposed; for that it was not amendable, being an Error in Judgment, which must be imputed the Act of the Court, and not of the Clerk; as, where a Capiatur is entered instead of Misericordia, or concessum est per curiam, instead of consideratum est; for these are erroneous in Point of Law, and the very same Case with this was held not to be amendable in Easter Term, 40 Elizabethæ.

So where the Judgment was, quod querens recuperet 100 l. per juratores assess. and 5 l. pro mis. per jurat. hic de incremento adjudicat. when it should have been per Curiam; it was not amended, because it was the Fault of the Court in the Judgment it self.

But upon the Reason of the Authorities cited for the Amendment, the Court rul'd this should be amended, which was done accordingly.

Curry *versus* Stephenson.

Hill. 1693. Rot. 37.

Ebor. ff.

Memorandum quod die Martis prox. post Octab. Sancti Hillarii isto eodem Termino coram Domino Rege & Dna. Regina apud Westm. veniunt Willielmus Curry & Anna uxor ejus Administratrix omnium & singulor. bonorum & catallorum jur. & creditorum quæ fuer. Christoferi Jackson defunct. tempore mortis suæ qui obiit intestat. per Willielmum Blackaller Attorn. suum & protulerunt hic in Curia dictorum Dni. Regis & Dominae Reginae tunc ibidem quandam billam

suam versus Johannem Stephenson in Custod. Mar. &c. de placito transgr. super casum & sunt pleg. de prof. scilicet Johannes Doe & Richardus Roe quæ quidem Billam sequitur in hæc verba ff. Ebor. ff. Willielmus Curry & Anna uxor ejus Administratrix omnium & singulorum bonorum & catallorum jur. & creditorum quæ fuere Christoferi Jackson defunct. tempore mortis suæ qui obiit intestat. queruntur de Johanne Stephenson in Custod. Mar. Maresch. Dni. Regis & Dominae

Indebitatus Assumpsit for Money due to the Plaintiff as Administratrix.

For so
much by
the De-
fendant
to the Use
of the
Plaintiff
as Admi-
nistrator
to J. S.
had and
received.

Admini-
stration
commit-
ted to one
of the
Plaintiffs.

Dominæ Reginae coram ipsis Rege & Regina existen. pro eo videlicet quod cum p̄d. Johannes primo die Augusti Anno Regni Dni. Williel. & Dominæ Mariæ nunc Regis & Reginae Angliæ &c. quarto apud Beedall in Com' præd. indebitat. fuisset eisdem Willielmo & Annæ ut Administratrici bonorum & catallorum præfat. Christoferi in 25 l. legalis monetæ Angliæ pro tant. denariorum summa per ipsum Johannem ad usum præfat Willielmi & Annæ ut Administratricis bonorū & catallorum dicti Christoferi ante tempus ill. habit. & recept. & sic indebitat. existen. præd. Johannes in consideratione inde super se assumpsit & eisdem Willielmo & Annæ ad tunc & ibidem fideliter promissit quod ipse idem Johannes præd. 25 l. præfat. Willielmo & Annæ cum inde postea requisit. esset bene & fideliter solvere & contentare vellet præd. tamen Johan. promission. & assumption. suas præd' in forma præd. fact. minime curans sed machinan. & fraudulenter intendens ipsos Willielmum & Annam in hac parte callide & subdole decipere & defraudare præd. 25 l. seu aliquem inde denarium præfat. Willielmo & Annæ (cui quidem Annæ administratio omnium & singulorum bonorum & catallorum jur. & creditorum quæ fuerunt præd. Christoferi tempore mor-

tis suæ per Richardum Sterne Artium magistrum scaccar. reverendissimi in Christo Patris & Domini Johannis Providentia Divina Eborum Archiepiscopi Angliæ Primat. & Metropolitan. legitime fulcit. cui commissio administration. ill. in hac parte de jure pretinuit 29 die Julii Anno quarto supradicto apud Beedall præd. in Com. prædict. debito modo commissæ fuit) licet sæpius requisit. non solvit nec eis pro eisdem aliquāliter contentavit sed ill. eis hucusq; solvere omnino recusavit & adhuc recusat unde præd. Willielmus & Anna dicunt quod deteriorat. sunt & dampnum habent ad valenc' 40. l. & inde producunt sectā &c. & profer. hic in Curia iidem Willielmus & Anna literas Administrator. præd. quæ commission' Administrationis præd' eidem Annæ in forma præd. testantur, &c.

Profe-
runt in
Curia
literas
admini-
strato-
rias.

Et præd. Johannes Stephenson per Nicholaum Harding Attorn. suum venit & defend. vim & injur. quando &c. Et dicit quod præd. Willielmus & Anna Action. suam præd. inde versus eum habere seu manutene-
nere non debent quia dicit quod billa ipsorum Willielmi & Annæ primo exhibita fuit 23 die Januarii Anno Regni Domini & Dominæ Willielmi & Mariæ nunc Regis & Reginae Angliæ &c. quinto & non an-

The De-
fendant
pleads,
That
Causa
actionis
non ac-
crevit in-
fra sex
annos &
91 dies
prox. an-
te exhi-
bit. bille.

rea quodq; causa actionis præd. in narratione præd' mentionat' non accrevit præfat. Willielmo & Annæ ad aliquod tempus infra sex Annos & nonaginta un' dies prox. ante diem exhibitionis billæ præfat. Willielmi & Annæ modo & forma prout iidem Willielmus & Anna superius inde versus eum queruntur & hoc parat. est verificare unde petit iudicium si præd. Willielmus & Anna actionem suam præd. inde versus eum habere seu manutenere debeant &c.

*The
Plaintiffs
reply, that
the Inter-
state di-
ed 1 Apr.
2 Jac. 2d.*

Et præd. Willielmus & Anna dicunt quod ipsi per aliqua per præd. Johannem superius placitando allegat. ab actione sua præd' inde versus eum habend. precludi non debent quia dicunt quod præd. Christopherus Jackson in narratione præd. superius nominat. apud Beedall præd. primo die Aprilis Anno Regni Domini Jacobi Secundi nuper Regis Angliæ, &c. secundo obiit intestat. quodq; administratio bonorum & catalorum Jurium & creditorum quæ fuerunt prædicti Christopheri tempore mortis suæ non fuit commissæ alicui personæ cui-cunq; usq; præd. 29 diem Julii Anno Regni dictorum Domini Regis & Domine Reginæ nunc quart. suprad. quo die administratio omnium & singulorum bonorum & catal. Jurium & creditor. quæ fuer. præd. Chri-

stopheri tempore mortis suæ per præfat. Richardum Sterne Artium Magistrum Scaccar. Reverendissimi in Christo Patris Domini Domini Johannis Providentia Divina Eborum Archiepiscopi Angliæ Primat. & Metropolitan. legitime fulcit. cui commissio Administrationis ill' in hac parte de jure ptin. apud Beedall præd. eidem Annæ tunc & adhuc uxor. ipsius Willielmi Curry primo commissæ fuit & sic iidem Will'us & Anna dicunt quod causa actionis præd' in narratione præd' mentionat. primo accrevit eis. Willo' & Annæ infra sex Annos prox. ante diem exhibitionis Billæ ipsorum Willielmi & Annæ præd. scilicet præd' vicesimo nono die Julii Anno quarto supradicto apud Beedall præd. & hoc pet. quod inquiratur per patriam.

Et prædict. Johannes Stephenson dic' quod placitum præd. per ipsos Willielmum & Annam modo & forma præd. superius replicando placitat. materiaq; in eodem content. minus suffic. in lege existunt ad ipsos Will'um & Annam ad action. suam præd. inde versus ipsum Johannem habend. manutenend. ad quod idem Johannes necesse non habet neque per legem terre teneatur aliquo modo respondere, Et hoc parat. est verificare unde pro defectu sufficien. replicati-
on.

on. in hac parte idem Johannes ut prius pet. Judicium & quod præd. Willielmus & Anna ab actione sua præd' inde versus ipsum Johannem habend. præcludantur &c. & pro causis morationis in lege super placito illo idem Johaunes secundum formam Statut. in hujusmodi casu nuper edit. & provis. ostendit & Cur. hic demonstrat has causas subsequen' viz. eo quod placitum ill. superius replicando placitat. non manutinet narration. præd' sed recedit ab eadem & est argumentativum incertum duplex in se repugnans & caret forma &c.

Et præd. Willielmus & Anna dicunt quod placitum prædict. per ipsos Willielmum & Annam modo & forma præd' superius replicando placitat. materiaq; in eodem content. bon. & sufficien. in lege existunt ad ipsos Willielmum & Annam ad action. suam præd' inde versus ipsum Johannem habend. manutened. quod quidem placitum materiamque in eodem content. ipsi idem Johannes & Anna parat. sunt verificare & probare prout Cur. &c. Et quia præd' Johannes ad placitum ill. non respondet nec ill' hucusq; aliquant. deduc. ipsi iidem Willielmus & Anna pet. judicium & dampna sua occasione præmiss. præd. sibi adjudicari &c. sed quia Cur. dic-

tor. Domini Regis & Dominae Reginae nunc hic de judicio suo de & super præmissis reddend. nondum advisatur dies inde dat. est partibus præd. coram Dno' Rege & Dna' Regina apud Westm. usq; diem Mercur' prox' post Quinden' Pasch' de judicio suo de & super præmiss. ill. audiend. eo quod Cur' dictor' Dni' Regis & Dnae' Reginae nunc hic inde nondum &c. (Et sic Continuât. usque diem Martis prox. post Tres Mich.) Ad quem diem coram Domino Rege & Dna' Regina apud Westm. ven. partes præd. per Attorn. suos præd' sed quia Cur' dictor' Dni. Regis & Dominae Reginae nunc de Judicio suo de & super præmissis reddend' nondum advisatur dies inde dat' est partib' præd' coram Dno. Rege & Dna' Regina apud Westm. usq; diem Mercur. prox' post Oct. Hill. ante quem diem dicta Dna. Maria Regina diem suum clausit extremum Ad quem diem coram Domino Rege Willielmo Tertio apud Westm. ven. partes præd. per Attorn. suos præd. super quo vis. & per Cur. dicti Dni' Regis nunc hic plenius intellectis omnibus. & singulis præmiss. maturaq; deliberation. superinde habita videtur Cur. dicti Domini Regis nunc hic quod placitum præd' per ipsos Willielmum & Annâ ux. ejus superius modo & forma præd' superius replicando placitat. materiaq;

*Continuâ
ances.*

*Death of
the Queen.*

Judg-
ment for
the Plain-
tiff.

riaq; in eodem content. minus
sufficien. in lege exist. ad ipsos
Willielmum & Annā ad acti-
onem suam præd. inde versus
ipsum Johannem habend. ma-
nutenend. Ideo Consideratum

est quod præd. Willielmus &
Anna Nichil capiant per billā
suam præd' sed pro falso Clam'
suo sint inde in Mia &c. Et
præd. Johannes eat inde sine
die &c.

Nil cap.
per
billam.

Curry & Ux. versus Stephenson.

2 Salk.
421.

THE Plaintiff William Curry and Ann his Wife as
Administratrix of one Jackson brought an Action
on the Case against the Defendant, in which they de-
clared, that the Defendant was indebted to them in
the Sum of 25 l. for so much Money received by
him for the Use of the said Ann, as Administratrix,
&c. and being so indebted, promised to pay it, &c.

The Defendant pleaded, Quod causa Actionis non ac-
crevit infra sex Annos prox. ante exhibitionem Billæ.

The Plaintiff replied, That Administration was
granted prout in the Declaration, so that the Cause of
Action did arise within six Years, &c. and concludes to
the Country, and upon a Demurrer to the Replica-
tion, and Joinder in Demurrer, Judgment was given
for the Defendant.

Because the Plaintiffs should have averred their
Replication, and not have made that Conclusion, for
by that means the Defendant had no Opportunity
to answer it.

It was also objected that the Plaintiffs had not
well entitled themselves to this Action, because it
was not in the Right of the Man, but of his Wife as
Administratrix.

But to that it was answered, that the Precedents
and Authorities were otherwise, for in Hillary Term,
3 Willielmi, an Administrator brought an Action a-
gainst an Executor, and declared in an Indebitatus as-
sumpsit for so much Money by the Testator for the Use
of the Plaintiff, ut administrator, had and received, and
Judgment was affirmed upon a Writ of Error in this
Court.

Lamb *versus* Mills.

Trin. 6 Willielmi, Rot. 560.

Trespas for taking of a Mare, &c.

The Defendant as to the Force, &c. pleaded not guilty, and as to the rest he justified, viz. That before the Trespass, &c. Sir John Smith was seized in Fee of the Manor of Bedminster in the County of Somerset, &c. and that he and all those whose Estate he had in the said Manor, semper habuerunt Curiam legalem, held for the same Manor twice in a Year, to which Court such Persons who were Tenants of the said Manor used to resort.

That such also who had a Right of Common there the Steward did usually appoint to be of the Jury.

That By-Laws were accustomed to be made there, and that all such Persons who have Common, &c. did obey those Laws, or pay a Forfeiture of a reasonable Sum to be imposed on them, &c.

That at a Court of the Lord of the said Manor held there upon reasonable Warning, a Jury was sworn, and a Law made, That every Person who had Common there should pay 40 s. for Depasturing his Cattle, where any Corn was standing or growing within the Manor.

That the Plaintiff held 40 Acres of Land of the said Manor and so he had Right of Common there.

That a Ground called Knowles Knapp in the Manor was sowed with Corn, and that the Plaintiff permitted his Sheep to depasture in the said Corn.

That this Offence was presented at the next Court, &c. and that the Defendant Ballivus Domini Manerii præd. did take the said Mare for the Forfeiture, &c.

Upon a Demurrer to this Plea several Objections were made,

(1.) That there cannot be a lawful Court to which the Tenants used to resort; if it had been Curia legalis generally, it might have been good.

But this Objection was not much insisted on, it being very immaterial, and only mentioned.

C c c

(2.) The

* Raft. Entr.
445. b. 606.
Brownl. Pre-
cedent 181.
Co. Entr.
666.

1 Leon. 231.
Cro. Eliz.
227.

(2.) The Justification was by Virtue of an Authority which the Defendant had not sufficiently set forth; for 'tis tanquam Ballivus Domini, &c. which is very uncertain, for he may be his Bailiff of another Manor: He should have set forth a * Precept and Mandate directed to him, and that he tanquam Ballivus Domini Manerii sui pd. did take the Mare, &c.

Econtra. But on the other Side it was said that the Defendant need not shew any Authority; as where a Tenant in Antient Demesne of the Village of Lastoff prescribed to be exempted from Toll throughout the Realm, and brought an Action against one for taking of his Goods at Yarmouth, who justified that it was an antient Town, &c. and prescribed to have Toll of the Tenants of Lastoff, and shews for what, and the Sum demanded, which being refused to be paid, he distrained; and it being objected in that Case, that the Defendant had not set forth any Authority in himself to demand the Toll, and the Taking of it being against Common Right, he ought for that Reason to shew an express Power; but notwithstanding this Objection the Defendant had Judgment.

Curia. There is a great Difference between the taking of Toll and the Distraining for a Penalty incurred as a forfeiture upon the Breach of a By-Law, because in the latter Case 'tis the Presentment of the Jury which makes the Duty

3 Mod. 131.
1 Salk. 108.
1 Show. 61.
3 Lev. 206.

If this had been in Replevin, tanquam Ballivus Domini, or per mandatum, &c. it had been good: But in Trespass a particular Power and Authority must be set forth; for the Bailiff cannot take a forfeiture ex officio: There must be a Precept directed to him for that Purpose, which he must shew in pleading; and 'tis not sufficient to say that he took it per mandatum, &c.

In Trespass the Defendant justified the taking per mandatum of the Sheriff, and this was held not good in the Case of Matthews and Curry, Mich. 1 Willielmi in this Court; whereupon Judgment in this Case was given for the Plaintiff.

Roop *versus* Scritch.

In an Action of Trespass several Trespasses were set forth, and the Defendant was found not guilty as to all but one, which was pedibus ambulando, and the Damages 5 s. and no more.

This Cause began originally in an inferior Court, and Farell. 129. was removed hither; and the Court allowed full Costs, tho the Damages were so small: quod nota.

Rex & Regina *versus* Buggs.

THE Defendant was indicted before the Justices of Peace in their Sessions, upon the Statute of 2 & 3 of Philip and Mary cap. 11. he being a Clothworker, and not living in a City, Borough or Town corporate, and yet keeping in his House more than one Woollen Loom, by Reason whereof he had forfeited 40 s. per Week.

An Exception was taken to this Indictment, for that the Justices had not Power to take it before them; for they cannot by Law hold Cognizance of Pleas upon penal Statutes, without an express Power given them by these Acts, and here being no such Authority allowed by this Act, the Indictment was for that Reason quashed.

Roberts *versus* Cook.

AN Ejectment was brought in the Common Pleas, and a Verdict for the Plaintiff, but he had no Costs; and now the Defendant in that Action brought a new Ejectment in B. R. against the same Plaintiff, and Sir Francis Windington moved, that he might have his Costs before he should be compelled to plead to the new Action.

But it was not granted, because he had no Averation, the Verdict being for him; but if it had been against him, or that he had been nonsuited, he should not have brought another Action before the Costs of the first had been paid, because it was a Averation to bring a new Action.

Kiffin *versus* Willis & Evans.

The Case was brought against two Defendants; one 2 Roll. Abr. 412. pleaded Not guilty, and a Verdict against him: The other pleaded a Release of all Actions, &c. and had a Verdict for him.

Sir William Williams moved for Judgment against the other Defendant who was found guilty; but it was denied, because the Trover being joint, a Release of all Actions discharged both. Vide the Preface to Hobart's Reports in *Cook versus Jennour*.

Tippin versus Coson.

1 Vent. 272.
1 Mod. 98,
121, 150,
237.
2 Lev. 75.
2 Salk. 675.
Show. Par.
Ca. 104.
ante 153.
Davis &
Speed.

IN Ejectment upon the Demise of Lucretia Tippin, a special Verdict was found to this Purpose, viz.

That Edward Coson being seized in fee of the Lands in Question, did in the Year 1656. in Consideration of a Marriage then intended to be had between him and Frances Try, and of 1000 l. Portion, &c. make a feoffment in fee to the Use of himself and his Heirs, until the said Marriage should take Effect, and afterwards to Frances his intended Wife for Life, then to Trustees and their Heirs during the Life of Edward, to support contingent Remainders; then to the first, second, &c. and so to the tenth Son of his Body in Tail-male, then to the Heirs Males he should have by any other Wife; and for Want of such Issue, then to the Heirs of the Body of the said Edward; and for Want of such Issue, then to his own Right Heirs.

In which Deed there was a Covenant to levy a fine, which was levied accordingly to the said Trustees to the Uses aforesaid.

The Marriage took Effect, and Edward had Issue by the said Frances, an only Daughter named Elizabeth, who married George Tippin by whom she had Issue Lucretia Tippin the now Lessor of the Plaintiff.

Elizabeth dying in the Life-time of Edward Coson her father, he levied another fine, and made a new Settlement of the Lands, viz. to himself for Life, then to his Wife for Life, Remainder to the Defendant and his Heirs with Warranty, &c.

The Question was, what Estate was vested in Edward by the first Settlement, that is, Whether the Heirs of his Body shall take by Purchase or by Descent? For if by Purchase, then the fine which he levied afterwards, is no Bar to them.

It was argued for the Plaintiff, that they must take by Purchase, because where the Ancestor has no Estate for Life, as in this Case he hath not, those cannot be Words of Limitation.

That Edward had no Estate for Life precedent to these Words, if he had, it must be either.

- (1.) By express Limitation.
 (2.) Or by Operation of Law.

'Tis not by express Limitation, for the Estate which is limited to him, is gone by the Marriage, and then 'tis immediately in the Wife, and he is not so much as named again but in the Limitation where the Inheritance upon failure of having Issue male, is fixed in the Heirs of his Body.

Neither can any Estate arise to him for Life in Right of his Wife by Operation of Law, but only ex post facto, viz. after the Death of his Wife.

Object. The only Authority which looks to the contrary, ^{2 Cro. 321.} is the Case of Fenwick and Mitford, which was a special Verdict in Ejectment upon a Lease made by Anthony Mitford, ^{Moor Case 437.} who being seised in fee, conveyed the Lands to the Use of Jasper his eldest Son and his Wife, and to the Heirs males of the Body of the said Jasper, Remainder to his own right Heirs. ^{Co. Lit. 22.b. Dyer 54 b.}

Jasper had Issue Mary only, and died; now tho' Anthony had no particular Estate, yet the Remainder limited to his right Heirs, was in him as his ancient Reversion, and was never out of him, but it did not vest in his right Heirs as a Remainder, by Way of Purchase, because the Law created an Use in him during his Life (tho he had departed with the whole fee) till the future Use should arise; and where-ever the Ancestor takes an Estate for Life, be it how it will, either by express Limitation or Operation of Law as in that Case, and then follows a Limitation to his right Heirs, they shall not take by Purchase, but by Descent.

Ans. But the Cases are not parallel, or guided by the same Reason, for the Estate moving from Anthony Mitford, so much of the Use as was not limited was in him as a Reversion, which was the very Reason of that Judgment; but here Edward hath expressly limited all the Estate to Trustees during his own Life, and the Remainder being afterwards limited to the Heirs of his Body, that must be a new created Estate, and consequently the Heirs must take by Purchase.

'Tis true, a Man cannot make his own right Heirs Purchasers by the Name of Heirs, either in a Conveyance by Way of Use, or by his last Will, but he may make them so when an Estate Tail is given, because that is a new created Estate different from what the Law makes.

As

1 Rep. 95. b.
Shelley's
Case.

As if a Feoffment in Fee be made to the Use of the Feoffor for Life, then to the Use of his Heirs, and of the Heirs males of their Bodies. The Word Heirs here is a Word of Purchase; for if it should not, then the Words which follow, viz. the Heirs males of their Bodies, would be void.

1 Mod. 226,
237.

There is a Resolution in Southcott and Stowell's Case, which seems to the contrary, viz. Thomas had Issue two Sons, Sir Popham his eldest Son, William his youngest Son.

Upon the Marriage of his eldest Son he covenanted to stand seized to the Use of his said Son, and of the Heirs males of his Body; and for Want of such Issue, to the Heirs males of the Body of the Father, Remainder to his own right Heirs.

Sir Popham had Issue Edward, and four Daughters.

Thomas the Father died, and Edward the Grandson died without Issue.

It was argued in that Case, That if Thomas had any Estate it must be a Fee-simple, upon Supposition that the old Use remained in him, and that William who was the Heir male of the Family, should not take by Descent, because his Father had no Estate for Life to support the Remainder limited to the Heirs males of his Body, and therefore it ought to go to the Daughters who were the Heirs general.

But it was adjudged, that William their Uncle should take by Descent as Heir male of the Body of Thomas who had an Estate for Life (as they held) by Implication, and so the Tail was executed in him.

1 Mod. 121,
159.

The like Resolution was in Michael Mitford's Case; he had Issue, Robert by a first Venter.

Afterwards he married a second Wife named Jane: By her he had Issue, Ralph, who had Issue Robert. Michael upon his second Marriage covenanted to stand seized to the Use of his Heirs males to be begotten on the Body of Jane, Reversion to his own right Heirs.

It was held that Michael had an Estate for Life by Implication, and the Tail likewise executed in him.

But neither of these Cases come up to the Point now in Question, but differ very much; because here the Fee-simple was absolutely vested in the Trustees during the Life of Edward; so that he could not have an Estate for Life either by Implication, or by Operation of Law.

(2.) A second Point was made viz. If it should be adjudged that they take by Purchase, then whether a collateral Warranty will not bar the Plaintiff, who is an Infant?

But this was not much insisted on, for it was generally agreed, that the Warranty could not have any Effect, because it was in the Case of an Infant, and that if he had been of full Age, it would not have prevailed, because these collateral Warranties are not much favoured in Law.

Econtra. Those who argued for the Defendant made these Points:

(1.) If no Estate for Life was expressly limited to him, yet such an Estate he had by Way of resulting Use.

(2.) And that the last Limitation to him and his Heirs will make such an Estate.

As to this Matter it was said, that if Edward had an Estate for Life, by Way of resulting Use, then his Heirs could not take by Purchase; and that it was plain he had such an Estate, because the Reversion of the Fee being not disposed by him, it must necessarily follow, that the Use of that Fee continued still in him, and caused an Estate for Life, till the future Use should arise; which Estate for Life being always in esse, was executed by the Statute to the Possession.

And tho' the Limitation to his right Heirs comes after the Heirs of his Body, yet that will make no Alteration, because not only Words but Sentences may be transposed to make the Deed answer the Intent of the Party.

But admitting there could not be any such Transposition by the Rules of Law, then it was said, that the Limitation to the right Heirs of Edward was void, because 'tis no more than what the Law would have cast upon them without those Words; and that the precedent Limitation, viz. to the Heirs of his Body, shall not be taken as a new created Estate, and different from what he had before in the Land, but as the antient Use thereof, which was never separated from his Person; for the Heirs of his Body are included in himself, and by Consequence such a Limitation must carry the Use to him; and this is sufficient to create an Estate for Life in him, as resulting out of the antient Fee; and therefore his Heirs must take by Descent.

This

This was the very Reason of the Judgment in Fenwick and Mitford's Case, in which there was a solemn Resolution made upon Conference with all the Judges of England, the Authority of which Judgment hath not been yet taken.

No Man will deny, that if a particular Estate for Life had been limited to him by his own Act, and afterwards to the Use of his Issue in Tail; and for Default of such Issue, to his own right Heirs; but that the Reversion of that Fee expectant upon the Determination of the Tail, had been still in him; for tho' he had departed with the Fee, as Edward did to the Trustees in this Case, yet he did not pass away the Reversion of that Fee, for that was limited to his right Heirs.

Now if such a Limitation is not void for the Reason above-mentioned, then it must necessarily create an Use in him for Life until the future Use should happen, because he could have no right Heirs during his own Life: And my Lord Coke tells us 'tis the same Thing where the Estate is created by Implication of Law, or by the Act of the Party; for which way soever it be, an Estate for Life he had; and the Contingency never happening, he had by that means an Estate-tail in him which was barred by the second Fine.

1 Mod 122.

Agreeable to this was the Opinion of my Lord Hale in a later Case of the same Nature; he held, That by the Limitation to his own right Heirs, no new Estate was raised, but the Reversion of the old Estate in Fee was qualified in the Feoffor or Covenantor by Operation of Law, and made an Estate for Life in him to serve the Limitation: These are his very Words.

Note,

There was no Judgment given in this Case upon the first Argument; but the Court inclined, that no Estate for Life did arise to Edward to support the subsequent Limitations; so that the Fee-tail was not executed in him, and by Consequence the Fine no Bar.

Walter *versus* Rumball.

Hill. 4 & 5 Willielmi & Mariæ. Rot. 272.

The Placita.
1 Salk.
147.

Plácita coram Domino Rege & Domina Regina apud Westm. de Termino sancti Hillarii Anno Regni Domini Willielmi & Domina Mariæ nunc Regis & Regina Angliæ, &c. 4 & 5. Rot. 272.

Memo-
randum.

Southton. ff. Memorand. quod alias scilt. die Sabbati prox. post Octab. Sancti Martini Termino Sancti Michaelis Anno Regni Domini Willielmi & Domina Mariæ nunc Regis & Regina Angliæ &c. tertio coram iisdem Domino Rege & Domina Regina apud Westm. venit Willielmus Walter Clericus per Ricum. Hill. Attorn. suum & protulit hic in Curia dictorum Domini Regis & Domina Regina tunc ibidem quandam billam suam versus Edmundum Rumball in Custod. Marr. &c. de plito. transgres. super casum & sunt pleg. de prof. scilt. Johannes Doe & Richardus Roe quæ quidem Billa sequitur in hæc verba ff. Southton ff. Willielmus Walter Clericus queritur de Edmundo Rumball in Custod. Mar. Marefc. Domini Regis & Domina Regina coram ipsis Rege & Regina ex-

Trove
for Cattle,
Goods
and
Chattels.

isten. pro eo videlt. quod cum præd. Willielmus primo die Novembris Anno Regni Domini Willielmi & Domina Mariæ nunc Regis & Regina Angliæ &c. tertio apud Andover in Com. præd. possessionat. fuit de Averiiis bonis & catallis sequen. videlt. de sex porcis duodecim porcellis Anglice ~~Biggs~~ *tribus* vaccis duobus juvenis Anglice *Bullocks* quatuor equis centum & duobus ovibus pretii centum librar. legalis monete Angliæ & de duabus struibus ~~sceni~~ *sceni* Anglice ~~Stacks of Hay~~ *una* strue hordei una strue pisarum & una strue tritici ad valentiam al. Centum librarum filis. legalis monete Angliæ ut de averiis bonis & catallis suis propriis & sic inde possessionat. existen. præd. Willielmus postea scilt. decimo die Novembris Anno tertio suprad. apud Andover præd in Com. præd. averia bona & catalla præd. extra manus & possession. suas casualiter perdidit & amisit quæ quidem averia bona & catalla sic amissa postea scilt. die anno & loco ult. supradict. ad manus & possessionem ipsius Edmundi per inventionem devenerunt præd. tamen

D d d

Ed-

Edmundus sciens averia bona & catalla præd. fore averia bona & catalla ipsius Willielmi propria & ad ipsum Willielmum de jure spectare & pertinere machinans tamen & fraudulenter intendens eundem Willielmum in hac parte callide & subdole decipere & defraudare averia bona & catalla præd. licet sæpius requisit. &c. eidem Willielmo nondum deliberavit sed præd. Edmundus averia bona & catalla illa postea scilt. duodecimo die Novembris anno tertio supradicto apud Andover præd. in Com. præd. in usum & commodum suum proprium convertit & disposuit unde idem Willielmus dicit qd. ipse deteriorat. est & dampnum habet ad valentiam ducentarum librarum Et inde produc. Sextam, &c.

Imparlance.

Et modo ad hunc diem scilt. diem Lunæ prox. post Octab. Sancti Hillarii isto eodem Termino usque quem diem præd. Edmundus habuit licentiam ad Billam præd. interloquendi & tunc ad respondend. &c. coram Domino Rege & Domina Regina apud Westm. venit tam præd. Willielmus per Attorn. suum præd. quam præd. Edmundus per Hen. Curle Attorn. suum & idem Edmundus defend. vim & injur. quando &c. Et dicit quod ipse non est inde culpabilis Et de hoc ponit se super patriam & præd.

Not guilty. pleaded.

Willielmus inde similit. &c. Ideo ven. inde jur. coram Dom' Rege & Domina Regina apud Westm. die Lunæ prox. post Octab. Purificationis beatæ Mariæ & qui nec &c. ad recogn' &c. quia tam &c. idem dies dat. est partibus præd. ibidem &c. postea continuatur inde processus inter partes prædict. de placito præd. per jur. posit. inde inter eos in respectum coram Domino Rege & Domina Regina apud Westm. usque diem Mercurii prox. post quinden. Paschæ extunc prox. sequen. nisi Justic. Domini Regis & Domine Regine ad Assisas in Com. præd. capiend. assign' prius die Martis undecimo die Aprilis apud Castrum Winton' in Com' præd. per formam Statuti &c. ven. pro defectu Jur. &c. Ad quem diem coram Domino Rege & Domina Regina apud Westm. venerunt partes præd. per Attorn. suos præd. & præfat. Justiciarii dicti Domini Regis & Domine Regine ad Assisas coram quibus &c. mis. hic recordum suum coram eis habitum in hæc verba scilt. Postea die & loco infracontent. coram Willielmo Dolben milite un. justiciar. Domini Regis & Domine Regine ad placita coram ipsis Rege & Regina tenend. assign. & Johanne Powell mil. un. Justiciar. dicti Domini Regis & Domine Regine de Banco Justiciar. eorundem Domini

The Po: sea.

mini Regis & Domine Regine ad Assisas in Com. South-ton. capiend. assign. per formam Statuti &c. ven. infranominat. Willielmus Walter Clericus per Attorn. suum infraccontent. & infrascript Edmundus Rumball licet solempniter exact. non venit sed default. fecit Ideo Jur. unde infra fit mentio capiatur versus eum per default. & jur. jurat. illius exact. quidam eorum viz. Johannes Hale Franciscus Kent &c. venerunt & in jur. ill. jurat. existunt & quia resid. jur. ejusdem Jur. non comperuer. ideo al. de circumstantibus per Vic. Com. præd. ad hoc elect. ad requisitionem ipsius Willielmi Walter ac per mandat. Justiciar. prædict. de novo apponuntur quorum nomina pannello infrascript. affilantur secundum formam Statuti in hujusmodi casu inde nuper edit. & provis. ac Jur. sic de novo appoit. videlt. Ricardus Hawes & Josephus Watt exact. similiter venerunt qui ad veritat. de infraccontent' simul cum aliis Juratoribus prædict. prius ad hoc impanellat. & jurat. dicend. elect. triat. & jurat. dicunt super sacramentum suum quod quidam Johannes Smith Armiger decimo sexto die Octobris Anno Regni Domini Caroli secundi nuper Regis Angliæ &c. vicesimo octavo seisit. fuit in domino suo ut de feodo de & in uno horreo & ducentis Acris terræ

cum pertin. jacen. & existen. in Foresta de Chute una parte inde infra hundred. de Kinnerfley in Comitatu Wilts. & altera parte inde infra hundred. de Andover extra in Com. South-ton & sic inde seisit. existen. postea scilicet decimo septimo die Octobris isto eodem anno per quandam indenturam suam sigillo suo sigillat. & Jur. præd. modo hic in evidencias ostens. geren. datum eodem decimo septimo die Octobris dimisit tenementa præd. cum pertin. cuidam Willielmo Walter patri p'd. Willielmi Walter modo querentis pro termino 21 annorum abinde prox. sequen. & plenar. complend. & finiend. reddend & solvend. proinde durante eodem termino eidem Johanni Smith hæredibus & assignatis suis annu- al. reddit. quadraginta & trium librarum & decem solidorum legalis monetæ Angliæ annuatim & quolibet anno ad Festum Annunciationis beate Mariæ Virginis & sancti Michaelis Archangeli per equales portiones quodq; virtute dimissionis illius præd. Willielmus Walter pater postea scilt. eisd. die & anno in dimissa præmissa intravit & fuit inde possessio- nat. pro & durante termino præd. reversion. inde eidem Johanni Smith ad tunc & adhuc spectan. quodque quadraginta & sex libræ & octo denar. de. redditu præd. vicesimo primo

D d d 2

die

*And eight more.**Tales de circumstantibus.**Special Verdict.**Seisin in Fee.**And demised by Indenture.**Lessee entered and was possess.*

Rent
Arrear.

And the
Defen-
dant by
order of
the Land-
lord's
Bailiffs
(the Land-
lord being
beyond the
Seas) di-
strained
for the
Rent-
Arrear
upon the
Lands set
in two
Hundreds
(the Lands
lying in
two Hun-
dreds.)

The Act
for Di-
stress
for Rent.

die Octobris Anno Domini
Millesimo sexcentesimo nona-
gesimo primo eidem Johanni
Smith aretro fuerunt & minime
solut. per quod præd. Edmun-
dus Rumball eodem vicesimo
primo die Octobris per manda-
tum & ordinem cuiusdam Hen-
rici Garnons adtunc & conti-
nue postea hucusque existen.
Ballivus præfat. Johannis Smith
eodem Johanne Smith adtunc
& continue postea hucusq; ex-
isten. in partibus transmarinis
bona & catalla in narratione
infra script. interius specificat.
adtunc existen. bona & catalla
ipsius Wilhelmi Walter modo
querentis in & super dimissa
præmissa adtunc levan. & cu-
ban. existen. videlicet unam
partem inde super istam partem
dimissorum præmissorum præd'
quæ jacet infra præd. hundred.
de Kinnerley in Com. Wilts
& alteram part. dimissor. præ-
missor. præd. quæ jacet infra præd'
hundred. de Andover extra in
Comitatu Southamp. pro. red-
ditu præd. sic in aretro existen.
distrinxit & deinde & de causa
districtionis ill. eidem Williel-
mo eisdem die & Anno notiti-
am dedit juxta formam statuti
in hujusmodi casu nuper edit. &
provis. intitulat. An Act for
the Enabling the Sale of
Goods distrained for Rent
in case the Rent be not
paid in a reasonable Time,
Et jur. præd. super sacramen-
tum suum præd. ulterius dicunt

quod ad aliquod tempus post
distriction. præd. præd. Wilfus
Walter modo queren. non tu-
lit vel psecut' fuit aliquod Breve
ad replegiand. bona & catalla
præd. per quod post quinq; dies
elapsi. & expirat. fuissent post
notitiam præd. eidem Williel-
mo & ante exhibitionem billæ
ipsius Wilfi scilicet secundo
die Novembris Anno Domini
1691. supradicto præd. Ed-
mundus Rumball simul cum
Constabulario hundred. de Kin-
nersley præd. pro tempore tunc
existen. causavit bona & ca-
talla præd. in narratione præd.
interius mentionat. infra hun-
dred. de Kinnerley præd. ap-
pretiari per duos appreciatores
ad appreciand. eadem vere se-
cundum optimam intelligenti-
am eorum infra hundred. ill.
jurat. per Constabularium ejus-
dem hundredi de Kinnerley
præd. in præsentia Constabula-
rii hundred. de Andover ex-
tra præd. quodq; post appreci-
ation. istam bonorum & catal-
lorum præd. & ante exhibitio-
nem billæ ipsius Wilhelmi Wal-
ter præd. Edmundus Rumball
quandam parcellam bonorū &
catallorum ill. quibusdam per-
sonis juratoribus præd. ignotis
vendidit sed iidē Juratores su-
per sacramentum suum præd.
ulterius dicunt quod bona &
catalla ill. sic vendit. non fue-
runt ad valentiam reddit. præd'
sic ut præfertur aretro existen.
nec ad valentiam reddit. ill. sic
aretro

No Re-
plevin
sued out.

The 5
days being
expired.

The De-
fendant
with a
Constable
caused
the Goods
to be ap-
praised.

And af-
terwards
sold the
Goods.

*The Goods
were not
of the
Value of
the Rent*

*And the
Residue
unsold be
hath yet
in his
Custody.*

aretro existen. vendit. fuerunt
& juratores præd super sacrum
suum prædict. ulterius dicunt
quod bona & catalla præd. ap-
pretiat. fuerunt modo & forma
præd. & non aliter vel alio mo-
do quodq; prædict. Edmundus
Rumball resid. bonorum & ca-
tallorum prædict. non vendit.
post appreciation. præd cepit
& asportavit ad vendendum
cum opportunum esset & bona
& catalla illa adhuc in custo-
dia sua detinet sed utrum super
tota maneria prædict. per ju-
ratores prædict. modo & forma
præd. compert. præd. Edmun-
dus Rumball culpabilis sit de
præmissis ei interius per narra-
tionem illam imposit. iidem ju-
ratores penitus ignorant & pet.
inde advisamentum Curiae Do-
mini Regis & Dominae Reginae
nunc hic & si super materia
illa videbitur Curiae hic quod
p^rd Edmundus Rumball sit cul-
pabilis de præmissis ei interius
per narrationem præd. imposit.

tunc iidem juratores dicunt su-
per sacram. suum quod præd.
Edmundus Rumball est culpa-
bilis inde prout præd. Wilpus
Walter interius inde versus
eum queritur & tunc assidunt
dampna ipsius Wilfi Walter
occasione inde ultra mis. & cu-
stag. sua per ipsum circa sectam
suam in hac parte apposit. ad
octoginta & sex libras & pro-
missis & custagiis illis ad qua-
draginta solidos Et si super to-
ta materia prædict. per iura-
tores præd. modo & forma
præd. compert. videbitur Curiae
hic qd. præd. Edmundus Rum-
ball non est culpabilis de præ-
missis ei interius per narratio-
nem præd. imposit. tunc iidem
Juratores super sacramentum
suum præd. dicunt quod præd.
Edmundus Rumball non est
culpabilis de præmissis ei per
narrationem præd. interius im-
posit. prout præd. Edmundus
Rumball interius inde placitan-
do allegavit Et quia &c.

Walter

Walter *versus* Rumball.

The Case.

1 Salk 147.

In Trover, upon not guilty pleaded, a special Verdict was found, viz. That John Smith Esq; was seized in Fee of a Barn, and 200 Acres of Land in the Forest of Chute, whereof part was in the Hundred of Kinnerly in Wiltshire, and the other part within the Hundred of Andover in Hampshire.

That being so seized on the 17th of October in the 28th Year of the Reign of King Charles the Second, he did demise the same to William Walter the Father of the Plaintiff for 21 Years, under the yearly Rent of 43 l. 10 s.

That by Virtue of that Demise the said Walter entred; and that 46 l. 8 d. was in arrear for Rent, and that the Defendant by the Order of the Bailiff or Steward of Mr. Smith who was beyond Sea distrain'd the Goods in the Declaration, for Rent, &c. being Levant and Couchant upon the Lands demised.

That part thereof was within the Hundred of Kinnerly, and the other part within the Hundred of Andover.

That the Defendant gave Notice of the Distress made by him, and that the Plaintiff did not replevy the Goods.

That five Days after such Notice, the Defendant with the Constable of the Hundred of Kinnerly, and in the Presence of the Constable of the Hundred of Andover, caused the Goods so distrained as aforesaid to be appraised by two Persons sworn for that Purpose by the Constable of the Hundred of Kinnerly, and in the Presence of the Constable of the Hundred of Andover.

That after the Appraisement the Defendant sold some part, but not to the Value of the Rent in arrear.

That he carried away such Goods, which remained unsold, in order to sell them when he should have an Opportunity; and so make a general Conclusion.

Those who argued for the Plaintiff took several Exceptions to the Verdict, viz.

That it was not found that the Goods were sold with the Concurrence of the Sheriff, or Constable, which they said was contrary to the Act; for by it they are required to be present as well at the Sale as the Appraisement; the Reason is, because if there should be any Overplus, it must be left in their Hands.

Another Objection was, That 'tis not found that the Goods were sold for the best Price which could be gotten for the same, and if sold at an under Rate, such Sale shall not conclude the Party.

Another Objection was, That 'tis not found the Defendant had any Direction to sell the Goods; 'tis only said that he took them by the Authority of the Landlord, who must be intended the Party distraining, and he might have kept them still as a Distress.

But these Things were not much insisted on, the material Exceptions were two,

(1.) 'Tis not found that Notice was left at the most notorious Place of the Premises, but only that it was given to the Plaintiff himself, who was Owner of the Goods, when it should have been given to the Tenant of the Lands by the express Words of the Act,

(2.) That he hath not caused the Goods to be appraised pursuant to the Statute.

As to the first Point, if the Statute was out of the Case, here is enough found to make the Defendant Guilty; for at the Common Law no Man was to be divested of his Property, but by the Judgment of his Peers by the Law of the Land.

'Tis true, this Statute hath made some Alteration of the Common Law; but if the Authority thereby given is not pursued, or if the Party abuse such Power which the Act invests him withall, he is a Trespasser ab initio.

'Tis like the Case where a Defendant as Bailiff of a Manor, to which Waifs and Estrays did belong, justified the taking of a Gelding as an Estray, which he kept till the Plaintiff resealed him. 2 Cro. 156.
8 Rep. 146. b.

The Replication was, that before the Reseizure the Defendant worked the Gelding, and upon a Demurrer he had Judgment; for 'tis an Abuse to work an Estray, because the Defendant had it only by Authority of Law, and the Abuse thereof makes him a Trespasser ab initio.

But because this Case will depend upon the Construction of the Statute, 'tis necessary to consider the Words, viz.

It requires that where Goods are distrained for Rent, and the Tenant or Owner shall not within 5 Days next after such Distress, and Notice thereof, &c. left at the chief Mansion-house, or other most notorious Place on the Premises replevy the same, that then after such Distress and Notice,
and

and five Days expired, the Person distraining may with the Sheriff, Under-Sheriff or Constable of the Hundred, Parish, or Place where such Distress was taken, cause the Goods to be appraised by two Men, to be sworn by them to appraise them truly, and after such Appraisement may sell the same for the best Price that can be gotten, &c. leaving the Overplus in the Hands of the Sheriff, Under-Sheriff, or Constable, &c.

Now the Defendant hath not pursued the Authority given by this Clause either within the Words or Meaning thereof; and tho' it is a remedial Law, yet considering the hard Methods it doth prescribe, it ought to be taken as a penal Law, and so to be construed very strictly.

That the Defendant hath not pursued the Authority given, &c. appears thus, viz.

'Tis found that the Goods belonged to the Plaintiff, and that Notice was given to him of the Distress, when by the express Words of the Act, it ought to have been given to the Tenant of the Lands, for otherwise the Design of this Law is not satisfied, because the Tenant of the Lands might have paid the Rent, and saved the Goods; and if not, he might have replevied them; and 'tis not found that he refused to replevy them; so this Circumstance is not pursued.

9 H. 4. 23. b.
14 H. 4. 28. b.
48 Ed. 3.
20. b.
Br. tit. Tres-
pafs 68.

That a bare Possession without a Property will entitle one to a Replevin, will not be denied; for 'tis frequent in our Books, that Trespass will lie for him in whose Possession Agistments are against any one who shall take them away.

'Tis true, the Act mentions the Owner who hath a special Property as well as the Tenant, who hath a general Property in the Goods; but it seems plain, that upon the frame and Construction of this Clause the Person who hath the general Property ought to have Notice of the Distress, because (as it has been observed) he might have replevied; and since no Man can discharge the Duty so well as the Tenant, therefore he ought to have the first Notice of the Distress.

He is likewise to be considered in the Consequence of this Case; for if his Cattle are taken away, he cannot cultivate the Land.

2d Point. He hath not caused the Goods to be appraised pursuant to the Statute.

Because a joint Authority is given to the Person distraining and to the Sheriff, Under-Sheriff and Constable of the Hundred, &c. where the Distress is taken, to see the Goods appraised: Now if the

the Appraisement was without them, or the Appraisers not sworn, or if sworn but not by a proper Officer, all is void.

And as to that the Distress was taken in two Hundreds, and the Appraisement by Persons sworn by one Constable and not of that Hundred where part of the Distress was taken; now the Statute requires the Constable of the Hundred where the Goods were taken, to see them appraised; so that both the Constables of both Hundreds had an Authority over this Distress, because taken in two Hundreds, and the Constable of one Hundred alone had no Power over the Goods taken out of his Hundred.

If a Man grant the Manor of Dale in the County of Wilts, and it extends as well into Berks as the other County, yet no more passeth than what is in Wilts. 2 Roll. Abf. 50.

The Statute of W. 2. gives Process in an Action of Waste against Guardians, Tenants in Dower, &c. and enacts, That if the Defendant do not appear upon the Summons, Attachment and Distress, the Sheriff shall take with him twelve Men, and go to the Place wasted to enquire of the Waste; this cannot be done by any other Person than the Sheriff, and it must be done at the very Place wasted, and no where else. Cap. 14.

So the Statute of Merton enacts, That where a Man is disseised, and recovereth in an Assize of Novel disseisin, and is again disseised, by the former Disseisor, that there he may have a Writ of Redisseisin directed to the Sheriff, commanding him, that assumptis secum coronatoribus he shall go to the Land in Person, &c. 20 H. 3. c. 5.

The Sheriff took with him but one Coroner, the other being sick; and upon Error to reverse a Judgment in Redisseisin, it was reversed for that very Reason, because the Authority given by the Statute was not strictly pursued, and yet that was a remedial Law. 2 Bulst 93.

The Distress in this Case is in Nature of an Execution, and therefore being taken in several Hundreds, the Constables of both these Hundreds should have caused the Appraisement to be made.

Econtra. The Questions do arise upon the Construction of this Statute, the Preamble whereof shews that it was made for the Benefit of the Landlord, and not of the Tenant, and therefore Notice to the Person of the Owner of the Goods is sufficient; for what Reason can be given why it should be left at the Mansion-house, but that the Owner might have Notice by his Tenant to replevy; and it could never be intended that Notice should be given to both, because 'tis in the Power of either of them to make a Replevin.

E e e

'Tis

'Tis the Owner of the Goods that is principally concerned, and therefore a personal Notice to him is much better than to be left either at the Dwelling-house, or any other notorious Place upon the Lands from which the Distress was taken.

2. As to the second Point, the Act justifies the Sale; for 'tis not in the Nature of a penal Law, and so to be strictly pursued, but 'tis a remedial Law, and must be construed according to Equity.

It proposes a Grievance, and then provides a Remedy by Appraisement and Sale of Goods, if not replevied within a certain Time therein limited.

This Appraisement was made by the Direction of one Constable in the Presence of the other, and the Concurrence of both or either of them seems not to be so necessary in any Thing relating to the Appraisement, as to the giving the Oath to the Appraisers.

The Constable is a known Officer in the Law; all which he is required to do by this Act may be done by Parol, viz. he may give Directions that the Appraisement may be duly made; and therefore his Presence only is sufficient.

His Assistance is for the Benefit of the Landlord, in order to prevent any Breach of the Peace, and for that Reason this Law ought to have the most favourable Construction that can be made.

A small Matter will amount to an Aiding or Assisting in a criminal Matter, but much smaller in a civil Act, especially where 'tis for the Benefit of the Party; and here the Constables of both Hundreds being present, and one administering the Oath in the Presence of the other, shews this was not only the Consent, but the Act of both, for they both had Authority to do it; and 'tis sufficient if done by one, because there was no Necessity of administering two Oaths.

Neither is it material that the Constable of Andover was out of his Hundred, because he having a sufficient Authority given him by the Statute may execute it in any Place; and tho' he should administer an Oath out of the Hundred, the Court will make a Construction of the Statute so as to give a Remedy to the Party, if no Inconvenience is likely to ensue.

Then as to the driving of the Cattle out of the Hundred, 'tis but one Distress, and must be taken as such; and the Driving, &c. is but the Continuance of the Taking.

Curia. Notice to the Owner is sufficient; if not, 'tis supplied after a Verdict by the Words juxta formam Statuti notitiam dedit, &c.

It seems to be at the Election of him who distrains, to give Notice either to the Tenant, or to the Owner of the Goods.

Then as to the Distress, tho' it was taken in two Hundreds, they being contiguous, 'tis but one entire Distress, especially since it was taken at one and the same Time, and for one entire Rent, and it ought to be put in one Pound; and therefore the Place where the Distress was driven, is the proper Officer within this Statute.

In Trespass for taking of his Cattle in D. the Defendant justified for Damage-feasant in his Freehold in S. from whence he brought them to the Pound in D. and traversed, that he took them there; this was adjudged repugnant, because the Driving them to the Pound in D. was only a Continuance of the first Taking. Latch. 60.

Judgment was given for the Defendant.

Rex & Regina *versus* Walcott.

A Writ of Error was brought by John Walcott to reverse an Attainder for a Treason committed by Thomas Walcott his Father. 1 Salk. 371.
Cases in
Parl. 127.

Many Errors were assigned, this Case depending several Terms in Court, but the most material Error was in the Judgment it self, viz. quod interiora sua extra ventrem suum capiantur, omitting ipsoq; vivente comburentur. 2 Salk. 153,
106, 134,
632, 162.
167, 200.
261.

These Words upon the first Argument seemed very essential, and seldom or never omitted in any of the Precedents of Judgments for Treason.

Those who claimed the Estate under the King's Grant, perceiving this to be of some Weight, did in another Term move, that Mr. Tanner Clerk of the Indictments for London, might attend, which he did, and produced the Record of the Attainder of Mr. Walcott in Court, and also the Indictment upon which he was tried; and it appearing that those Words were amongst the Minutes taken by him, and indorsed on the Indictment, it was prayed that the Omission might be rectified, and the Record amended by the Minutes.

But this was opposed by the Counsel on the other Side, because if these Words should be inserted, there would be then two Records; and it could not be a Question upon which of those Words this Writ was brought; for certainly it must be upon the Record entred at length, and settled by Advice of Counsel, and not upon these short Minutes taken by the Clerk.

1 Roll. Abr.
196.

In the 14th Year of Caroli I. a Man was attainted of Murder before the Justices of Assize; he brought a Writ of Error, and assigned for Cause, that the Record certified by the Clerk of the Assize, was, viz. That he was indicted before the Justices, &c. on the 18th of March, and tried before the 20th of the same Month, which was an Error in fact, because it did not appear that there was any Continuance entred between those Days, and tho' it was only a Disposition in the Clerk in transcribing the Record, yet the Court would not suffer it to be amended, it being a Criminal Case.

If there is an Error in Drawing up the Record, this Court cannot amend it, but it must be done by that Court where the Judgment was given.

'Tis true, a Record of B. R. may be amended by another of the Common Pleas, but the Reason is, because of Diminution alledged, which cannot be to the Sessions of Gaol-delivery.

The Record not being amended, it was thus argued for the Plaintiff in the Writ of Error, viz. That the Omission of these Words was in a necessary and not in a formal Part of the Judgment.

But in criminal Cases, even Matters of form are essential, and so held in this Court in the Case of the King and Tucker; and certainly if the Law takes Care that the Indictments should be exact in form, a much greater Care ought to be taken in the substantial Parts of the Judgment.

Ever since the Reign of H. 7. in almost all the Precedents these Words are in the Judgment: There are some few Cases where they are omitted, but those were either drawn up in haste, or might be purposely left out, when the King's Pardon was intended for the Criminal.

'Tis likewise true, that this is a Treason at the Common Law; and that the Statute of Ed. 3. prescribes no form of a Judgment in Treason; but yet this Judgment shall not be conformable to those at the Common Law before the Reign of H. 7. because all those Judgments were defective and entred only in short Notes, which was the true Reason of making the Statute of 29 Eliz. cap.

2. to confirm all Attainders of Treason made before that Time, which (as the Statute takes Notice) were either defective by Corruption, or negligent Keeping the Records.

The like may be said of the Year-Books, which mention only some short Notes of the Judgments in Treason; 'tis true, that of Humfrey Stafford is at length, but that Book and Brook in abridging of it are both mistaken; for the Roll is. that ante mortem corda scindantur. 1 H. 7. 24.

Judgments in Treason, which is the highest Offence that can be committed, ought to be certain and very exact; they were never yet discretionary, for that would be to give the Judges a Power to favour some, and pronounce more severe Sentences against others, which they never did, or will undertake to do; they only are to give such Judgments which are directed by Law.

Some Variances may be found both in my Lord Coke and Justice Staundford in Judgments of Treason, but they differ only in immaterial Circumstances, such as drawing on a Hurdle, &c. but agree in all other Parts; and where they are entered at length, these Words are always inserted. 3 Inst. 210.
211.
Co. Entr.
361. b.
423. 699.
Ralt. Entr.
413. b.

So that these Words are necessary or not; if not necessary, then those Judgments in which they are inserted, are all wrongful; but if necessary, then the Omission of them is short of what is required by Law, and by consequence the Judgment is erroneous.

Econtra. Those who argued for the King, held, that drawing, hanging and quartering are the substantial Parts of the Judgment, and the other Words are only in terrorem, and may be therefore omitted.

That the Precedents of Judgments in Treason are various, viz. some Things which have been actually done, as drawing on the Hurdle, have been omitted in the Judgment.

In that Judgment mentioned by my Lord Coke in 3 Inst. quod secreta membra amputentur are left out, and yet those Words are necessary in the Execution of the Judgment it self.

They are inserted in the Judgment in Staundford, but the Prince of Wales's Case doth not agree either with my Lord Coke or Staundford, for the Judgment there is only combustus, &c. but doth not say in conspectu suo. Fleta lib. ii
cap. 16.
2 Inst. 195.

In all the ancient Precedents these Words are left out, and with great Reason; for 'tis inconsistent in Nature for a Man to be living after his Entrails are taken out of his Body.

In

31 Car. 2.
Rot. 1.
Rot. 343.

In 26 Car. Rot. 56. in the Notes of the Clerk of the Peace of Middlesex these Words are omitted.

So they are in Owen's Case, where the Court recited the Judgment at large.

The Statute of 25 Ed. 3. enacts what shall be Treason; yet that is declarative of the Common Law, and mentions no express form of a Judgment for that Offence; so that notwithstanding that Act, the Judgment in Treason must be as it stood at the Common Law.

If so, there is no certain Judgment for this Crime found in any of the ancient Law-Books; for they vary from the Records, and differ from each other.

If the Judgment in Staundford is Law, which agrees with this, saving only in the Omission of these Words, then my Lord Coke is mistaken by leaving out that Circumstance of drawing upon a Hurdle.

From this it may be reasonably collected, that he had seen all the Records; and upon Consideration of the Judgments, it was his Opinion, that they did and might differ in form according to the Circumstances of the Case.

But if either the Year-book of H. 7. or the Abridgment of that Case is Law, then Staundford and my Lord Coke are both mistaken; the Judgment there is at length, 'tis that he be sent back to the Tower, and put upon a Hurdle, and drawn through London to Tyburn, and there hanged; that his Heart be cut out before he is dead, his Head cut off, and his Body divided into four Parts, and left to the Will of the King.

Now this Judgment differs in many Things from the Judgment in my Lord Coke, for 'tis not said quod suspendatur per collum, nor quod vivus ad terram prosternatur, nor quod interiora sua extra ventrem capiantur, ipsoque vivente comburentur.

'Tis true, the Judgment in the Earl of Leicester's Case agrees with that in the 3d. Inst. but in Anno 5 R. 2. a Man was convicted before Tresilian Chief Justice, for conspiring the Death of the King, and the Judgment was quod viscera de corpore suo extrahantur, & igne comburantur, which might be after he was dead.

Neither have these Words been in all the later Precedents, but if they had, it can be no Objection in this Case because this Judgment is at the Common Law, and therefore to argue from modern Precedents, is not to the Purpose.

Besides, the greatest part of these Records vary from Staundford and my *Ld. Coke*, and yet they stand good in Law; and it cannot be shewed where the Omission of these Words was ever objected; much less where an Attainder was ever reversed for this Reason.

Therefore if this Judgment should be erroneous for the Cause now objected against it, many more may be reversed for the Omission of more material Circumstances.

Curia. The Attainder ought to be reversed for the Omission of these Words.

As this is the greatest Crime, so it deserves the greatest Punishment, and it seems very agreeable to natural Justice that there should be some Proportion between them.

Now tho' Death is *ultimum supplicium*, yet that is the Punishment for Felony, which is an Offence of a less Nature, therefore Treason should be punished not only *cum ultimo supplicio*, sed *cum aggravatione pœnæ corporalis*, vel *cum pœna qua nulla asperior*, because 'tis a Crime committed against the Body Politick in the Person of the King who is the Head of the Kingdom, and of whose Preservation the Law takes so great Care that it punisheth the very Intention to commit Treason against him; but no Man can be guilty of a Felony without an Act done.

Smith de Rep. Ang. 245.

Finch's Law, cap. 28. 12 H. 8. 13.

When the Law of England appoints a particular Judgment for an Offence, 'tis not in the Power of the Judges to alter it either by any Addition or Diminution.

'Tis true, there is no Act of Parliament (as has been observed) which appoints a formal Judgment in High Treason, then it must be considered what Judgment was directed by the Common Law in such Cases, and it will appear that the Precedents for above 200 Years have been uniform without the Omission of those Words, or some of the same Import.

These were mentioned, viz. in 1 H. 4. 1. in the Earl of Huntingdon's Case, where it is, That he be cut down alive, and his Entrails taken out of his Body and burnt.

In Humphry Stafford's Case, 'tis in the Year-book of H. 7. *quod ante mortem cor scindatur*; and Brook in abridging of that Case mentions the Judgment more fully viz. he tells us it was, *Quod ante mortem corda scindantur*, which comprehends all the internal Parts.

The next Attainder was of Edmond Bohun Duke of Buckingham; it was Anno 13 H. 8. 'tis mentioned in Stow's Chronicle p. 513. and the Judgment is with these Words.

In

ol. 699.

In Anno 3 E. 6. John Bury was attainted, 'tis mentioned in my *Ld. Cok's Entries* with these Words.

fol. 387.

Anno 1 Mariae Robert Dudley was attainted, 'tis pleaded in the *Earl of Leicester's Case* in the *Commentaries* with these Words in that Judgment.

fol. 182.

Then Justice Staundford in his *Book of the Pleas of the Crown*, which he wrote Anno 2 Eliz. mentions a Judgment in High Treason, with Words which amount to the same Sense viz. That his Entrails be burnt in his View.

fol. 422, 423.

'Tis so likewise in the *Case of John Littleton* which happened Anno 43 Eliz. 'tis pleaded in my *Ld. Cok's Entries*, and so is the Judgment in his 3d. *Institutes*.

And then in the *Case of my Ld. Stafford* which was 33 Car. II. it was debated what Judgment should be given against him, and a Motion being made that he should have Judgment to be beheaded, 10 of the Judges were consulted if any other Judgment should be given than what was usual in such Cases. Whether it would work an Attainder of Blood? They were all of Opinion that they could not take Notice of any Judgment in the King's Courts but what was appointed by Law; and thereupon the Lord High Steward pronounced the ordinary Judgment, viz. that his Bowels should be ripped up before his Face and thrown in the Fire.

As to the Objections and Precedents produced to maintain a contrary Opinion, they may receive this Answer.

Object. First, That this Judgment is not erroneous by Reason of this Omission, because the Words *vivus ad terram prosternatur* are of the same Sense and Signification.

Ans. Those Words are in all the Precedents cited before, but would not have been sufficient if the subsequent Words viz. *ipsoq; vivente comburentur*, had been left out.

Lib. 1. c. 16.

Object. The *Case of David Prince of Wales* has been objected, which happened Anno 9 Ed. 1. 'tis mentioned by *Fleta*, that he *detraclus suspensus decollatus dismembratus & combustus fuit*, but doth not say in *conspectu suo*.

2 Inst. 195.

Ans. This was a Judgment in Parliament, which differs from the usual Judgment not only in this, but in many other Things, as may be seen in *Cotton's Abaidgment*, 401.

There are 20 other Judgments in Treason before the 25th of Ed. 3. in which these Words are omitted; but it doth not appear by the Books for what Species of Treason those Attainders were.

But those Judgments were not only defective in this, but in many other Parts thereof; for 'tis not mentioned in any of them where the Quarters shall be disposed, &c.

So in those Judgments in 21 R. 2. Rot. 22. and in Easter Term against Henry Roper there was the same Defect; and in Zouch and Manner's Case it was defective in more Particulars, viz. *Quod Secreta membra amputentur & in igne ponantur, quod interiora extra ventrem capiantur & in igne ponantur & ibidem comburentur*, is all left out.

So that these and all other Precedents which can or may be produced before the Reign of H. 4. signify but little to prove these Words may be omitted in Treason for conspiring the Death of the King, because in those Days they were very negligent in entering of Judgments, and therefore (as has been observed) the Statute of 29 Eliz. was made to confirm those irregular and mistaken Entries.

There may be some Judgments of a later Date produced, wherein these Words were left out, it may be in the later end of the Reign of King Charles II. but they were against Popish Recusants, who had neither Lands or Goods to forfeit, and so little Care was likewise taken in entering of those Judgments.

The giving of Judgment against Malefactors is part of the Constitution of the Government, and therefore it was something extraordinary to affirm at the Bar, that Judgments in High Treason were discretionary, which indeed is only a softer Word for arbitrary.

If that Doctrine should once pass for Law, then the Courts which give Judgments might make new Punishments as they should think more suitable to the Crimes; they might pronounce a Jewish Judgment, viz. that the Offender should be stoned to Death; or a Turkish Judgment, that he should be strangled; or a Roman Judgment, that he should be murder'd; or a French Judgment, that he should be broken on the Wheel; all which are contrary to the known Laws of this Realm.

This being then an essential part of the Judgment settled and stated by the Common Law of England, the Omission of these Words makes it void.

Like the Common Case of a Judgment in an Assumpsit for 8 l. Damages, and 2 d. Costs: The Entry was thus,

F f f

¶ Ideo

Yelv. 107.

ff. Ideo conf. est &c. quod (the Plaintiff) recuperet damna sua per jurat' &c. assess. ad octo libras necnon 20 s. pro mil. & custagiis de incremento &c. omitting the 2 d. for Costs assessed by the Jury, which is not helped or included by the Increase, that is, by the Act of the Court ex officio, for which Reason the Judgment is erroneous.

Lastly, This Reason was added to the Authorities before recited, viz. if this Omission in the most severe part of the Judgment shall not be Error, then those Judgments which have these Words cannot be supported, because a heavier Punishment is by that Means afflicted on the Subject than allowed by Law, and may for that Reason be reversed.

Therefore it must of Necessity be, that those Words make a necessary part of the Judgment in High Treason, and the Omission of them makes it erroneous.

Neither is it impossible in Nature (as hath been objected) that such a Judgment should be executed; for Colonel Harrison, one of the Regicides, was cut down alive, and after his Entrails were taken out of his Body, he rose up, and had Strength enough left to strike the Executioner.

The Judgment was reversed; which Judgment of Reversal was afterwards affirmed in the House of Lords. Show. Par. Cases 129.

Hunt *versus* Braines.

Hill. 6. Rot. 411.

In Replevin for taking bona catalla & averia, &c. The Defendant made Cognizance for the taking of averia only, for that a Rent-charge of 100 l. per Annum was granted out of the Lands, &c. payable half-yearly at Michaelmas and Lady-day, that 33 l. parcel of 50 l. for half a year's Rent being behind and unpaid, he distrained, and so justifies the taking; inde petit judicium & retorn' averiorum bonorum & catallorum predict'.

Cro. Car.
102.

Upon a Demurrer to this Abowry, it was held to be insufficient, because he did not shew when the other 17 l. was paid to make up the half Year's Rent.

Besides, the Action was brought for taking bona catalla & averia, and the Defendant abowed the taking of averia only, which is an Answer only for the live Cattle, and not for the Whole; and for these Reasons the Plaintiff had Judgment.

D E

D E

Termino Paschæ.

Anno 7 W. III. Regis in B. R. 1695.

Williams, *Executor of Mellish, versus* Cary Under-
 Sheriff of Wilts.

THE Plaintiff as Executor to Mellish, brought an Action on the Case against the Defendant for a false Return, setting forth, that his Testator 4 Jacobi had recovered a Judgment against one Smart for 140 l. and that he sued out a Testatum Fieri fac. against him, which he delivered to the Defendant, who made Execution, and levied Goods, &c. to the Value of 101 l. and returned that he had levied only 19 l. 19 s. which he was ready to pay; and that he had more Goods in his Possession, to the Value of 40 l. which remained with him pro defectu emptorum, whereas in truth he had levied more.

i Salk 12.
 i Vent. 30.
 i Sid. 48, 80.

That afterwards Mellish the Testator died, and for this false Return the Plaintiff brought an Action, and had a Verdict.

And now it was moved in Arrest of Judgment, that the Plaintiff, as Executor, could not maintain this Action, because it was a personal Tort done to his Testator, for which the Executor could have no Remedy after his Death.

F f f 2

In

Cro. Car.
297.
1 part 913.

In Hillary Term 8 Caroli, this was made a Doubt in the Case of Purstow and Prince, but my Lord Rolle in abridging of that Case tells us, that the Action would not lie.

Hob. 206.

Econtra. It will not be denied, but that an Action of Debt will lie against a Sheriff for Money levied by Virtue of an Execution, and not answered to the Creditor; for tho' there is no actual Contract between the Sheriff and the Creditor, yet Debt will lie upon a Contract in Law; because when the Money is levied, the Action ceases against the Defendant, and is transferred to the Sheriff; and if it could not be recovered of him, there would be a manifest Injury done to the Party.

4 Ed. 3. c. 13.

It cannot be properly said in this Case, that there is any actual Wrong or Injury done to the Person of the Testator; for if so, then moritur cum persona; but 'tis an Injury done to his personal Estate in which he is represented by his Executor, and therefore he may maintain this Action within the Equity of the Statute de bonis asportatis in vita Testatoris, which gives him an Action of Trespass for a Wrong done to his Testator.

Noy. 87.
Poph. 187.
Litch. 167.
Jones 173.

An Executor may have a Replevin or Detinue for taking of Goods in the Life-time of his Testator, because the Property still continues, and so doth the Wrong to his Estate in this Case.

6 Mod. 181.

Therefore it hath been held, that he may have a Trover for any Conversion in the Life of the Testator, and likewise an Escape upon mean Process, because the Body of the Prisoner being a Pledge for the Debt, the Executor might be otherwise without any Remedy.

12. 407.

So he may have Debt against a Parishioner for not setting out of Tithes in the Time of his Testator, because the Statute makes it a Duty.

Therefore tho' 'tis true, that a personal Action dies at Common Law with the Person, yet upon the Equity of this Statute a Wrong done to his Estate still remains.

Judgment was given for the Plaintiff nisi causa.

Gibbons *versus* Pepper.

2 Salk. 637.
Style 72.
1 Vent. 295.
2 Lev. 172.
2 Jones 205.
3 Lev. 37.

In Assault and Battery the Defendant pleaded, that he was riding on a Horse in the High-way, and that on a sudden fright the Horse started and run upon the Plaintiff, who continued in the Way after he was called to go out, which was the same Assault.

To this Plea the Plaintiff demurred, and it was moved in Behalf of the Defendant, that what he had pleaded, was a sufficient Excuse; for it was no Neglect in him, and the Mischief done was inevitable.

'Tis like the Case of Weaver and Ward, where in Trespass, Assault and Battery, the Defendant pleaded, that he was a trained Soldier, and that he and the Plaintiff were under one Captain, and in mustering he discharged his Gun, which casualiter, & per infortunium & contra voluntatem suam did hurt the Plaintiff; and it was there held, that if the Defendant had pleaded that he could not have avoided it, or that the Plaintiff had run cross the Gun when it was discharging, or had set forth the Circumstances so that it might appear to the Court to be inevitable, that such a Plea had been a sufficient Justification.

Hob. 134.
Roll. Abr.
548.
Moor 864.

But it was answered, that Case was not parallel with this, because the fact was confessed there; but the Battery is not answered here; he should have pleaded the General Issue, for if the Horse run away against his Will, he would not have been found Guilty, because in such Case it cannot be said with any Colour of Reason to be a Battery in the Rider. The Plaintiff had Judgment.

Derrier versus Arnaud.

Hill. 6 Willielmi, Rot. 416.

INdebitatus assumpsit, the Defendant pleaded that the Plaintiff was alienigena in Regno Franciæ sub Ligantia adversarii Domini Regis, &c. ORIUNDUS.

And upon a Demurrer Exception was taken to this Plea, because 'tis not a direct Affirmative that the Plaintiff was alienigena; it should have been Natus, and not oriundus.

Curia. In a Real Action the Word Alienigena had been well enough, but some Doubt being made whether it was so in this Case a farther Day was taken to consider of it; and afterwards some Precedents being cited out of Rastal, where the Word natus was supplied by oriundus, the Plea was held good.

Entr. 252. b;
605. b.

St. Leger *versus* Pope.

Dominus Rex & Domina Regina mandaverunt dilecto & fideli suo Georgio Treby militi capital. Justic. suo de Banco breve suum clausum in hæc verba, viz.

Guilielmus & Maria, &c. Reponf. Georgii Treby militis capital. Justic. infranominat. Recordum & processum loquelæ unde infra fit mentio cum omnibus ea tangen. coram Domino Rege & Domina Regina ubicunque &c. ad diem infraconten. mitto in quodam Recordo huic brevi annex. prout interius mihi precipitur Georg. Treby Plita. irrotulat. apud Westm coram Georgio Treby milite & sociis suis justiciariis Domini Regis & Domine Regine de Banco de Termino sancti Michis. Anno Regni Domini & Domine Willicmi & Mariæ Dei gratia &c. quinto, Rot. 337.

Middlesex ff. Johes. St. Leger nuper de parochia sancti Martini in Campis in Com. præd. Armiger. alias dictus John St. Leger of Donocale Esq; summonitus fuit ad respondend. Rogero Pope Ar. de plito. quod reddat ei cencum & septem libras & decem soli-

dos quos ei debet & injuste detinet &c. Et unde idem Rogerus per Johannem Oliver Attorn' suum dicit quod cum prædict. Johannes St. Leger & Rogerus Pope octavo Dei Julii Anno Dom' millesimo sexcentesimo nonagesimo primo apud paroch. sancti Martini in campis in comitatu Middlesex Latrunculis luser. ad ludum Anglice voc. *Back-Gammon* cumq; ad ludum illum præd. Rogerus adtunc & ibm. uno jactu jecit quatuor super unam aleam & quatuor super alteram aleam Anglice *threw two fours* cumq; superinde præd. Rogerus adtunc & ibidem tetigit & paulatim movebat duos latrunculorum suorum Angl' *two of his Table-men* sed non amovebat illos a statione sua Anglice *from the point they stood on* cumq; superinde adtunc & ibidem pignore certat. fuit Anglice a *Wager was laid* inter prædict. Johannem St. Leger & præfat. Rogerum modo sequenti videlt. qd. præd. Rogerus solveret præfat. Johanni St. Leger centum & quinquaginta nummos aureos Anglice vocat. *Guineas* si præfat. Rogerus tenebatur jure lusus illius amovere Anglice *to play* duos Latrunculos illos quos ita movit quodq; præd' Johannes

St Leger solveret præfat. Rogero centum nummos aureos si præd. Rogerus non tenebatur jure lusus illius amovere Anglice **to Play** duos latrunculos illos quos ita movit & præd. Johannes St. Leger & Rogerus adtunc & ibidem pro determinatione pignorationis illius Anglice **of that Wager** posuer. se super judicium Atrienfis Anglice **of the Boom-Porter of England** cumq; p'd Johannes St. Leger eisdem die & Anno suprad. apud paroch. præd. per scriptum suum sigillo suo sigillat. Curiaque dicti Domini Regis & Dominae Reginae nunc hic ostens. cujus dat' est eisdem die & Anno cognovit pignoratione præd. Anglice **the said Wager** & p'd. Johannes St. Leger per idem scriptum obligavit seipsumolvere præfat. Rogero Pope vel ordini suo Centum nummos aureos Angl. vocat. **Guineas** quando Atrienfis Anglice **so soon as the Boom-Porter** adjudicaret Anglice **should give his judgment** in casu illo si accideret quod judicium illud foret contra præd. Johannem St. Leger & idem Rogerus in fact. dicit quod postea post confectiorem scripti præd. & ante impetrationem brevis originalis præd Rogeri in Curia hic scilt. 31 Die Juli Anno Domini 1691 supradicto quidam Thomas Neale Armiger. tempore confectiorem scripti

prædict' & diu antea & abinde adhuc existen. Atrienfis Anglice **the Boom-Porter of England** in casu præd' adjudicavit contra præd. Johannem St. Leger scilt. qd. præd. Rogerus non tenebatur jure lusus illius amovere Anglice **to play** duos latrunculos illos quos ita movisset nisi movisset illos a statione sua Anglice **off from the Point** quodq; centum nummi aurei Anglice vocat. **Guineas** tempore confectiorem scripti præd. & diu antea fuer. & adhuc existunt valoris prædictarum Centum & septem librarum & decem solidorum scilt. apud parochiam præd. in Com. præd. unde præd. Johannes St. Leger adtunc & ibidem habuit notitiam præd. tamen Johannes St. Leger licet seplus requisit. præd. Centum & septem libras & decem solidos eidem Rogero non reddidit sed ill. ei hucusq; reddere omnino contradixit & adhuc contradicit unde dicit quod deteriorat. est & dampnum het. ad valentiam 40 l. & inde producit sextam &c.

Et præd Johannes per Edmundum Hubberfeild Attorn. suum ven. & defend. vim & injuriam quando &c. Et petit auditum scripti præd. & ei legitur in hæc verba ff. ¶ John St Leger of Donocale Esq; do own that ¶ I have betted with Lieutenant Colonel Roger Pope one hundred Guineas

neas against an hundred and fifty, concerning a Dispute arising on the Manner of playing a Cast at Back-gammon, which is stated and signed by us both, and Captain Francis Chantrel, and referred to the Decision of the Broom-Porter of England. And I do by these Presents oblige my self in the Word and Honour of a Gentleman, to pay unto the said Roger Pope or his Order, or whom he appoints to receive it, one hundred Guineas so soon as the Broom-Porter gives his Judgment on the Case; if it so happen that the Judgment be against me. The Question to the Broom-Porter is stated under the Letters of A. B. and C. John St. Leger is meant by A. and Roger Pope by B. Given under my Hand and Seal this 8th. Day of July 1691. Quibus lectis & auditis idem Johannes dicit quod ipse de debito pd. virtute scripti pd. onerari non debet quia dicit qd. in statuto in Parlamento Domini Caroli secundi nuper Regis Angliæ inchoat. apud Westm. in Com. Middlesex octavo Die Maii Anno Regni dicti Domini nuper Regis decimo tertio & per diversas Prorogationes & adjournament. ibid. continuat. usq; decimum sextum diem Martii Anno Reg-

ni ejusdem nuper Regis decimo sexto inter alia autoritate ejusdem Parliamenti ordinat. & inactitat fuit qd. si aliqua persona vel psonæ ad aliquod tempus vel tempora post vicessimum nonum diem Septembris in Anno Domini 1664. luderet ad & cum pictis chartis Anglice Cardsaleis latrunculis &c. (reciting the Statute.) Prout p eundē actum inter alia plenius apparet & idē Johannes in facto dicit quod post 29 diem Septembris Anno Domini 1664. supradict. & ante confectiōem scripti prædicti. prædict. octavo die Julii Anno Domini 1691. suprad. apud paroch. prædict. in Com. prædict. ipse idem Johannes & prædict. Rogerus ludebant cum aleis ad quendam ludum vocat. Back-gammon quodq; pd. Centum nummi aurei vocat. Guineas in prædict. script. mentionat. ad tunc & ibm' ad unum tempus & unum congressum Anglice meeting fuerunt pignorat. Anglice betted per eundem Johannem cum prædict. Rogero & perdit. in lusu illo & non cum vel pro pecuniis deposit. Anglice ready Money quodq; pd. centum nummi aurei vocat. Guineas tempore pignorationis illius Anglice at the Time of the said Bett necnon tempore adjudicationis in narratione prædict. Rogeri per Thomam Neale in eadem narratione mentionat. fieri supposit. fuerunt valoris

ultra summam centum librarum viz. valoris centum & septem librarum & decem solidorum superius petit. viz. apud parochiam præd. in Com. prædict. quodque præd. centum nummi aurei tempore lusus illius non fuerunt pignorat. Anglice betted in pecuniis deposit. Anglice ready Money neque tempore adjudication. p'd. in narratione p'd. fieri supposit' solut. sed pro securitate solutionis præd. centum nummorum aureorum per ipsum Johannem cum præd. Rogero ut præfertur pignorat. Anglice

betted idem Johannes postea scilt. prædicto octavo die Julii Anno Dom. millesimo sexcentesimo nonagesimo primo supradicto aquod paroch. præd. in Com. præd. scriptum præd' in narratione præd. mentionat' præfat. Rogero dedit figillavit & ut factum suum deliberavit per quod ac vigore statuti p'd. in eo casu inde edit & provis. scriptum præd. fuit & est vacuum & nullius vigoris in lege & hoc parat. est verificare unde petit judicium si ipse de debito prædicto virtute scripti præd. onerari debeat &c.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer; and Judgment was given for the Plaintiff in the Common Pleas; and now a Writ of Error was brought, and the general Error assigned, and in nullo est erratum was pleaded.

St. Leger *versus* Pope.

The CASE.

THE Plaintiff and Defendant were playing at Back-gammon, and the Plaintiff in the Action touched the Tablemen, but did not remove them from the Points; a Dispute arising between them ended in a Wager, which was reduced into Writing, by which the Plaintiff in Error was obliged to pay Mr. Pope an hundred Guineas if he was not bound by the Course of Play, to remove and play those Tablemen he touched, and Mr. Pope was to pay him 150 Guineas if he was obliged.

This Wager was to be decided by the Grroom Porter, who gave Judgment, that Mr. Pope was not obliged to play the Men he touched; whereupon the hundred

G g

Guineas

5 Mod. 4.
1 Salk.
344

Guineas were lost; for which the Action was brought below, and upon the Statute pleaded, Judgment was given for the Plaintiff, and now it was argued for the Plaintiff in Error.

That the Demand was wrong, because the Note on which the Action is brought is for Payment of Guineas; now Guineas quatenus such cannot be demanded, because they are of no certain or determinate Value, for they may be altered, added or diminished by Prerogative; and therefore the Statute 5 & 6. Ed. 6. prohibits the buying of Coin, because no Person can set a Value thereon but the King.

Besides Guineas are by Proclamation at 20 s. Value and no more; and if so, the Plaintiff has a Judgment for more than the Law allows, and this being an English Coin, you cannot declare for it ad valentiam, &c. as 'tis usual for foreign Coin, in which Case the Action is brought in the detinet only, because the Value of such Coin is not known to the Court, and therefore 'tis uncertain what Sum shall be recovered.

But for English Coin the Action is always brought in the Debet and Detinet, and without ad valentiam.

If therefore the legal Value of a Guinea is 20 s. the Plaintiff hath obtained an unlawful Judgment, viz. for more than the Value, if it is above 20 s. than the Sum will amount to more than 100 l. and so within the Statute of Gaming.

To this it was answered, That the Writing doth warrant the Declaration and the Demand, for if Guineas are not of the noted and common Coin of the Kingdom, and of no certain Value, then they are as foreign Coin to the Court, and they may be demanded as in that Case, so likewise in this by so many Pieces of Money valoris, &c. and in the Debet and Detinet, because the Value of them is reduced to a Certainty.

But if the Demand here had been of Guineas only, without saying so many Pieces of Gold, then it had been like the Demand of Dollars in foreign Coin, and the Action must have been brought in the Detinet, because the Thing in Specie is demanded.

Then as to the Statute of Gaming it doth not concern this Action, because this is a Wager, and not within the Reach of that Law; 'tis not any playing, but a collateral Matter concerning the Right of a particular Game.

No Judgment was given concerning this Matter, but an Objection was made that there was a Variance between the Declaration and the Note therein set forth; for the Action was grounded on a Wager, and the Plaintiff declared that

that the Defendant per scriptum suum &c. cognovit pignorationem, Anglice the Wager, and upon Oyer of the Writing there is nothing therein relating to such an Acknowledgement, so that he made that to be a part of the Description of the Writing which should have come in by Way of Averment out of it, viz. he ought to have averred that the Wager in the Writing, and for which the Action was brought was the same Wager, &c. and for this Reason the Judgment was reversed.

Strode versus Birt.

Trin. 6. Rot. 515.

Dominus Rex & Domina Regina Mandaver. dilecto & fideli suo Georgio Treby Mil. Capital Justic. de Banco breve suum clausum in hac verba viz. Gulielmus & Maria Dei Gratia, Angliæ Scotiæ Franc., & Hiberniæ Rex & Regina fidei defensores &c. dilecto & fideli suo Georgio Treby Milit. Capital Justiciario suo de Banco salutem Quia in recordo & processu ac etiam in redditione judicii loquelæ que fuit in Curia nostra coram vobis & Sociis vestris Justiciariis nostris de Banco per Breve nostrum inter Thomam Byrt & Edwardum Strode Armigerum & Richardum Thorn de quadam transgressionem super casum eidem Thomæ per præfat Edwardum & Richardum illat. ut dicitur Error intervenit manifestus ad grave damnum ipsorum Edwardi & Richardi sicut ex querela sua accepimus nos errorem

si quis fuerit modo debito corrigi & partibus pd. plenam & celerem justitiam fieri volentes in hac partes vobis mandamus quod si judic. inde reddit. sit tunc recordum & processum præd. cum omnibus ea tangen. nobis sub sigillo vestro distincte & aperte mittatis & hoc breve ita quod ea habeamus in Octab. purificationis beatæ Mariæ ubicunq; tunc fuerimus in Anglia ut inspect. record. & processu præd' ulterius inde pro errore ill. corrigend. fieri faciamus quod de jure & secundum legem & consuetudinem hujus Regni Angliæ fuerit faciend. Teste nobis ipsis apud Westm. vicesimo nono die Januarii An. Reg. nostri quinto. Paget.

Respons. Georgii Treby Mil. Capital. Justiciar. infra-nominat. Record. & process. loquelæ unde infra fit mentio cum omnibus ea tangen. coram
G g 2 Domino

Domino Rege & Domina Re-
gine ubicunq; &c. ad diem in-
fracontent. mitto in quodam
recordo huic brevi annex. pro-
ut interius mihi præcipitur.

Geo. Treby.

Placita irrotulat. apud
Westm. coram Georgio Treby
Milit. & Sociis suis iusticiariis
Domini Regis & Dominae Re-
ginae de Banco de Termino
Sanctæ Trinitatis Anno Regni
Domini Gulielmi & Dominae
Mariæ Dei gratia Angl. Scotiæ
Franciæ & Hiberniæ Regis &
Reginae fidei defensor. &c. quin-
to Rot. 313.

Somerset ff. Edwardus
Strode nuper de Downside in
Com. præd. Armiger & Ri-
chardus Thorne nuper de ea-
dem Yeoman Attach. fuerunt
ad respondend. Thomæ Byrt de
placito transgr. super casum
&c. Et unde idem Thomas per
Galfridum Pottinger Attorn.
suum queritur quare cum ipse
idem Thomas Byrt primo die
Maii Anno Regni Domini Re-
gis & Dominae Reginae nunc
Secundo & continue abinde
postea hucusq; legitime posses-
sionat. fuit & adhuc posses-
sionat. existit de & in uno tene-
mento continen. in se unum mo-
lendinum fullonicum unum mo-
lendinum granaticum unum
clausum pasturæ unā rodā ter-
ræ & unam peciam terræ vo-
cat. Wythybed cum pertin. in

Paroch. de Shepton Mallet in
Com. præd. ac per totum idem
tempus ipse idem Thomas Byrt
de jure habuisset & habere &
gaudere debuisset communiam
pasturæ in mille Acris terræ
vocat. Mendip Forest in
Com. præd pro omnibus ave-
riis suis communicabilibus in
& super tenementa prædicta
cum pertin. levan & cuban'
quolibet anno omni tempore
anni tanquam ad tenementa
sua prædicta spectan. & per-
tinen. prædict. Edwardus &
Richardus præmissorum non
ignari sed machinan' & malitio-
se intenden. eundem Thomam
Byrt in hac parte minus rite
prægravare injurare & quam
plurimum damnificare & ipsum
Thomam Byrt de communia
sua præd. in præd. mille acris
terræ vocat. Mendip Forest
& de usu proficuo & beneficio
inde magnopere & minus iuste
impedire & deprivare ac ipsum
Thomam pejorare & deteriora-
re ipsi iidem Edwardus & Ri-
chardus eodem primo die Maii
Anno secundo supradicto apud
Shepton Mallet præd. solum
& fundum præd. mille acrarum
terræ vocat. Mendip Forest in
diversis locis ejusdem Forestæ
effoderunt & subverterunt &
quam plurima antra p. cuni-
culis Angl. Cony. Boroughs,
adtunc & ibidem fecerunt &
erexerunt & cuniculos adtunc
& ibidem in eisdem mille Acris
terræ vocat. Mendip Forest
locaverunt

locaverunt & propagaverunt & antra & cuniculos ill. ibidem per totum tempus ill. custodiverunt & continuaverunt qui quidem Cuniculi quam plurimam part' herbae ibid. crescen. diversis diebus & vicibus infra tempus praed. depast. fuerunt spoliaverunt conculcaverunt & consumpserunt iidemq; Edwardus & Richardus eodem primo die Maii Anno secundo supra dicto & diversis diebus & vicibus infra tempus praed. in eisdem mille acris terrae vocat. *Mendip forest* quā plurimos laqueos & tendiculos ibidem sparsim fixerunt posuerunt custodiver. & fingi & poni procuraverunt per quod viginti oves ipsius Thomae Byrt in & super tenementa sua praedicta cum pertin. levan. & cuban. per ipsum ad herbam in eisdem mille acris terrae vocat. *Mendip forest* tunc crescen. depascen. imposuit uten' communia sua praed. in laqueos & tendiculos ill. ibidem incider. & ibidem capt. quamplurimum damnificat. deteriorat. & spoliat. fuerunt & nullius usus sive valoris eidem Thomae ad tunc & ibidem devenerunt ratione quorum quidem praemissorum idem Thomas communiam suam praed. pro ovibus & averiis suis praed. in & super tenementa sua praed. cum pertin. levan. & cuban' per totum tempus praed' habere uti seu gaudere in tam amplo & bene-

ficiali modo prout debuit uti seu gaudere non potuit sed idem Thomas usum proficuum commoditat. easiment' & beneficium Communiae pasturae suae praed. in praed. mille acris terrae vocat. *Mendip forest*, p totum idem tempus perdidit & amisit ad dampnum ipsius Thomae Centum librarum & inde producit sectam, &c.

Et praedict. Edwardus & Richardus per Henricum Godfrey Attorn' suum ven. & defend. vim & injuriam quando &c. Et dicunt quod narratio praed. materiaq; in eadem content. minus sufficien. in lege existunt ad ipsum Thomam actionem suam praed. inde versus eisdem Edwardum & Richardum habend. seu manutenend. ad quam quidem narrationem iidem Edwardus & Richardus necesse non habent nec per legem terrarum tenentur respondere & hoc parat. sunt verificare unde pro defectu sufficien. narration. in hac parte iidem Ed'us & Rich'us petunt iudicium & quod praed. Thomas ab actione sua praed. inde versus ipsos habend. pracludatur &c. Et pro causis moration. in lege iidem Edwardus & Richardus dicunt & ostendunt Curiae hic quod praed. Thomas in narratione sua praed. non monstrat aliquam praescription' seu aliquem alium titulum ad communiam praed. habend. ac etiam dicta narratio

narratio valde incerta est & caret forma.

Et prædict. Thomas ex quo ipse sufficien. materiam in lege in narratione sua præd. ad action. suam præd. versus præd. Edwardum & Richardum habend. manutenend. superius declaravit quam ipse parat. est verificare quam quidem materiam præd. Edwardus & Richardus non dedicerunt nec ad eam aliquam qualiter respondent sed verificationem ill'admittere omnino recusant idem Thomas petit iudicium & damna sua occasione præmissor. sibi adjudicari &c. Et quia Justic. hic se advisare volunt de & super præmissis priusquam iudiciū inde reddant dies inde dat. est partibus præd. hic usq; a die sancti Michaelis in tres septimanas de audiend' inde iudicio suo eo qd' iidem Justic. hic inde nondum &c. ad quem diem hic venit tam præd' Thomas quam præd. Edwardus & Richardus per Attorn. suos præd. & super hoc visis pmissis & per Justiciar. hic plenius intellectis videtur eisdem Justiciar' quod narratio præd' in forma præd. fact. & declarat. ac materia in eadem content. sufficien. in lege existunt ad ipsum Thomam actionem suam præd. versus præfat. Edwardum & Richardum habend. manutenend. prout præd. Thomas superius allegavit ac quod idem Thomas

dampna sua occasione præmissorum versus præfat. Edwardum & Richardum recuperare debeat sed quia nescitur quæ dampna idem Thomas sustinuit occasione præmissorum præcept. est Vic. quod per sacrum proborum & legalium hominum de balliva sua diligenter inquirat quæ dampna idem Thomas sustinuit tam occasione præmissorum quam promissis & custagiis suis per ipsum circa sectam suam in hac parte apposit. & Inquisitionem quam &c. Vic. constare fac. hic. in Octab. Sancti Hillarii sub sigillo &c. & sigillis &c.

Ad quem diem hic venit præd. Thomas per Attorn. suum præd. & Vic. videlicet Robertus Siderfin Armiger modo mand. hic quandam inquisitionem coram eo apud Civitatem Wellen' in Comitatu præd. 12 die Januarii ult. præterit. per sacrum duodecim &c. capt. per quam compertum existit quod præd. Thomas sustinuit dampna occasione præmissorum ultra mis. & custag sua per ipsum circa sectam suam in hac parte apposit. ad quinque solid. & pro mis. & custagiis ill. ad duos denarios Ideo conf. est quod prædict. Thomas recuperet versus præfat. Edwardum & Richardum dampna sua præd. ad quinque solidos & duos denar. per inquisitionem præd. in forma præd. compert' nec-

nechon quindecim libras quatuordecim solidos & decem denar. eidem Thomæ ad requisitionem suam p misis & custagiis suis p Curiam hic de incrementis adjudicat. quæ quidem dampna in toto se attingunt ad 16 l. & pd. Edwardus & Richardus in mia. &c. sign. 28 die Februarii Anno sexto Willielmi & Martæ.

Postea scilicet die Veneris px. post Crastinum Sanctæ Trinitatis Anno Regni Domini Willielmi & Domine Mariæ nunc Regis & Regine Angliæ, &c. sexto coram Domino Rege & Domina Regina apud Westm venerunt prædicti Edwardus Strode & Richardus Thorne p Petrum Courtney Attorn. suum & dicunt quod in recordo & pcessu prædicti. ac etiam in redditione iudicii præd. manifeste est erratum in hoc videlt. quod per recordum præd. apparet quod iudicium ill. in forma præd. reddit' reddit. fuit p præd. Thoma Byrt versus præd. Edwardum Strode & Richardum Thorne ubi per legem terræ huius Regni nostri Angliæ iudicium illud reddi debuisset pro prædicti. Edwardo Strode & Richardo Thorne versus eundem Thomam Byrt Ideo in eo manifeste est erratum, erratum est etiam in hoc quod non habetur aliquod Breve original. inter præd. partes de placito præd. ad warrantizand. narrationem

præd. Thomæ Byrt præd. de recordo affilat. nec de recordo reman. in custodia custodis Brevis dicti Domini Regis & Domine Regine de Banco præd. Ideo in eo similiter est erratum & iidē Edwardus Strode & Richardus Thorne petunt Breve dicti Domini Regis & Domine Regine præfat. custod. brevium ipsorum Domini Regis & Domine Regine de Banco præd. dirigend. ad certificand. dicti. Domino Regi & Domine Regine plenius inde veritatē & eis conceditur &c. p quod præcept. est Willielmo Thursby Armigero Custod. brevis dicti Domini Regis & Dne. Regine de Banco prædicti. quod scrutatis Brevis originalibus de Com Somerset. de Terminis sanctæ Trinitatis Anno Regni dicti Domini Regis & Domine Regine nunc quinto in custodia sua de recordo existen. & quid de eodem brevi invenerit una cum retorn ejusdē adeo plane & integre put coram se remanet dicti. Domino Regi & Domine Regine indilate ubicunque &c. certificet una cum brevi Dom. Regis & Domine Regine sibi inde direct. &c. qui quidem Willielmus Thursby custos brev. de Banco prædicti. Domino Regi & Domine Regine retornavit & certificavit quod virtute brevis pd sibi direct. scrutat. brevis originalibus comitatus Somerset. præd.

præd. de præd. Termino sanctæ Trinitatis Anno quinto supra dicto in custodia sua existen. in eisdem invenit quoddam Breve original. inter partes prædict. de plito præd. de recordo affilat. cujus quidem brevis tenor sequitur in hæc verba ff. Gulielmus & Maria Dei gratia Angliæ Scot. Franciæ & Hiberniæ Rex & Regina fidei defensores &c. Vicecomiti Somerset. salutē si Thomas Byrt fecerit te securum de clamore suo prosequend. tunc pone p vadios & salv. pleg. Edwardū Strode nuper de Downside in Com̄ tuo Ar. & Richardum Thorn nuper de Downside in Com̄ tuo Yeoman quod sint coram Justiciariis nostris apud Westm̄ in crastino sanctæ Trinitatis ostens. quare cum ipse idem Thomas Byrt primo die Maii Anno Regni nostri secundo & continue abinde postea hucusque legitime possessionat. fuit (as in the Declaration) ad dampnum ipsius Thomæ Centum librarum ut dicit &c. & habeas nomina pleg. & hoc breve Teste nobis apud Westm. 26 Die Maii Anno Regni nostri quinto. Paget p Dominum Custodem magni sigilli Angl. ad instantiam peten. pleg. de pros. Johannes Doe & Richardus Roe. infranominat. Edw. & Ricus. Nichil' hent. in balliva mea per quod attach. possunt Warwick Bampfild Ar. Vic. Ret. p Fin.

H. Hetherington quod quidem breve de Certiorari una cum retorn. inde inter recorda sine die istius Terminis affilat. Et sup hoc idem Thomas Byrt p Josephum Sherwood Attorn' suum gratis ven. sup quo præd. Edwardus Strode & Richardus Thorne ut prius dicunt quod in recordo & processu præd. acetiam in redditione Judicii præd. manifest. est erratū allegand. errores præd. p ipsos in forma præd. allegat. & pet. quod judicium præd. ob errores ill. & al. in recordo & processu præd. existen. revoceatur adnulletur & penitus pro nullo habeatur & quod ipsi ad omnia quæ occasione judicii præd. amiserunt restituantur & quod præd. Thomas Byrt ad errores præd. rejangat & quod Curia dicti Domini Regis & Domine Regine nunc hic procedat. ad examination. tam record. & process. præd. quam mater, prædict' superius p errore assign. sup quo præd. Thomas Byrt dicit quod nec in recordo & processu præd. nec in redditione judicii præd. in ullo est erratū & petit similiter quod curia dicti Domini Regis & Domine Regine nunc hic procedat ad examinationem tam record' & process. præd' quam mater prædict' superius pro erroribus assign' & quod judicium præd. in omnibus affirmetur &c. Et quia Curia dicti Domini Regis & Domi-

*The Continuances
begin in
Mich.
Anno
6 Will.
& Mariae
and end
in Tri-
nity
Term
Anno 8
Will. 3.*

Domina Regina nunc hic de
judicio suo de & super præ-
missis reddend. nondum advi-
satur dies inde dat. est parti-
bus coram dict. Domino Re-
ge & Domina Regina a die
sancti Michaelis in tres septi-
manas ubicunq; &c. de judicio
suo inde audiend. eo quod Cu-
ria dict. Domini Regis & Do-
minæ Reginae nunc hic inde
nondū &c. ad quē diē corā
Domino Rege & Domina Re-
gina apud Westm̄ ven. partes
præd. per Attorn. suos præd.
sed quia Cur. dict. Dom. Re-
gis & Domina Reginae nunc
hic de judicio suo de & super
præmiss. præd. reddend. non-
dū advisatur dies inde datus
est partibus prædict. corā Do-
mino Rege & Domina Regi-
na usque in Octab. Sancti
Hilarii ubicunq; &c. de ju-
dicio suo inde audiend. eo
quod Cur. dict. Domini Regis
nunc hic inde nondū &c.
ante quē diē Domina Maria
Regina diē suū clausit extre-
mū ad quē diē coram Domino
Will. tertio nunc Rege Angliæ
&c. apud Westm̄ ven. partes
præd p Attorn. suos præd. &
sic continuatur usque in crasti-
no sanct. Trinitatis ubicunq;
&c.

Ad quem diem coram Dom.
Rege apud Westm̄ ven partes
præd. per Attorn. suos præd.
super quo visis & per Cur.
dict. Domini Regis nunc hic
plenius intellectis omnibus &
singulis pmissis diligenterq; ex-
aminatis & inspectis tam re-
cord. & pcess. p̄d. quam præd.
causis & materiis superius pro
Error. assign. videtur Cur. dicti
Dom̄ Regis nunc hic qd. nec in
Record. & process. p̄d. nec in
reddition' Judicii p̄d. in ullo est
erratum ac quod record. ill. in
nullo vitiosum aut defectivum
existit Ideo conf. est quod Ju-
diciū præd. in omnibus af-
firmetur ac in omni suo robore
stet & effectu dictis causis & ma-
teriis superius pro Error' assign'
in aliquo non obstan. Et ulte-
rius per Cur. Dom. Regis nunc
hic conf. est qd' præd. Thomas
recuperet versus præd. Edwar-
dum & Richardum triginta &
unam libras eidem Thomæ p
Cur. Dom. Regis nunc hic se-
cundū formā statuti in hujus-
modi casu nuper edit. & p̄vis.
adjudicat' pro castagis & dam-
nis suis quæ sustinuit occ'one
dilacon' execution. judicii p̄d.
pretextu prosecution. prædict.
brevis de Error' Et quod præd.
Thomas habeat inde executi-
on. suam &c.

Strode *versus* Byrt.The *C A S E*.3 Lev. 175,
266.

THE Plaintiff brought an Action on the Case against the Defendant, setting forth that he was possessed of a Tenement, and of a Close of Pasture, and Wood of Land, &c. in Shipton Mallet, and that he had Right of Common in Mendip Forest for his Cattle, &c. *tanquam* thereunto belonging, that the Defendant did dig and make Con-boroughs in the said Forest, and set Nets and Gins there by which his Sheep were damaged, and he deprived of his Right of Common, &c.

The Defendants demur to the Declaration, and Judgment was given against them in the Common Pleas; and upon a Writ of Error brought in this Court, the Question was, Whether the Declaration was good or not? because it sets forth that the Plaintiff legitime possession. *fuit de tenemento*, &c. which was not sufficient to entitle him to this Action, but that he ought to shew a Title by Custom or Prescription, or otherwise, and not to declare upon the bare Possession, without any other Right; for he claiming a Profit arising out of another Man's Soil, ought to have set forth a particular Estate to himself, either by Grant, Prescription or some Conveyance, and not to say, that he was possessed, &c. and ought to have Common, &c. *tanquam ad tenementa sua spectant*, without shewing how, or in what Manner, which is so uncertain, that no Issue can be taken upon it.

1 Inst. 303. b. Therefore he ought to have shewn the Commencement of his Estate, and how he came to be intitled to the Common, which in this Case must be either appendant, or nothing; and if so, he must set forth the Beginning of it, that the Defendant might give him an Answer.

(2.) 'Tis impossible that the Defendant could take Issue upon this Declaration; for 'tis said, that the Plaintiff *de jure debuisset habere communiam*; now if the Defendant had pleaded *non de jure habere debuisset*, then the Law, and not the Fact, had been put in Issue.

:Tis

'Tis true, when an Action is brought upon a Possession for a Wrong done, then such a general Way of declaring may be well enough; but where the Right is in Question, 'tis never so.

Now this Action is brought upon the Right, &c. for the Words *de jure debuisset habere, &c.* and *gaudere debuisset* import a Right and nothing else. Ante, 346.

In Trespass for the taking of a Gelding and impounding of it; the Defendant pleaded, that tempore quo &c. he was possessed, &c. of a Close, &c. in which he took the Gelding Damage feasant; and upon a Demurrer it was shewn for Cause, that he had not set forth by what Title or in what Manner he was possessed; and Judgment was given for the Defendant, Hill. 2 & 3 Jacobi B. R. Rot. 695. inter Langford and Webber. 3 Mod. 132.

So in Trespass for chasing of his Sheep, the Defendant made Conusance as Bailiff to Serjeant Trindar for Damage feasant in an Acre of Ground, of which the Serjeant was possessed; and there was a Demurrer to the Plea, because he did not shew what Title or Estate he had, nor any Seisin or Freehold, and therefore Judgment was given for the Plaintiff: This was in the Common Pleas, Trin 4 Willielmi between Godfrey and Rock.

This Way of pleading is not only contrary to all the Authorities of the like Nature in the old Books, but those also of later Times.

Antiently when a Tenancy at Will was pleaded, it was always shewn how, viz. either by Demise, or as a Copyholder. or as Tenant at Sufferance. Br. tit. plead-
ing 85,

So where a Seisin in Tail was pleaded, it was constantly set forth of whose Gift, because it is a particular Estate; 'tis true, where a Seisin in Fee is alledged, 'tis otherwise.

My Ld. Brook in abridging of that Case abobe-mentioned, says, 'tis good pleading, and has mark'd it with these Words, viz. *Quod nota.* Br. tit. plead-
ings 160,
170.

It cannot be properly objected, that in a Bar 'tis necessary to set forth a Title, but not in a Writ or Count, because this Objection is contrary to the old Law; for 'tis as essential to set forth a Title as well in the one as the other.

Therefore in 24 Ed. 3. the Pleadings in a Scire fac. were, that his Father died seised, and that the Lands descended to him as Son and Heir, &c. and it was adjudged, that he ought to have shewn of what Estate his Father died seised.

So in this Case an Action will not lie for depriving a Man of such a Common, because 'tis claimed as belonging to the bare Possession of a Tenant; so that his being a

H h h 2

Resiant

Resiant in the House, is an Excuse to him for a Trespass done in another Man's Soil; but certainly no Action will lie for Damage done to such a Commoner, because there is no durable Estate or Interest laid to which any Common may belong.

Co. Ent. 9,
10, 14.
Brownl. 250.

But if he had set forth any Interest, he ought to have made it more certain than to say *tanquam ad Tenementa spectan.* for if this pleading should be allowed, then a possession under any Title would be sufficient, which is so uncertain that no Man can be provided to make his Defence against it.

There cannot be a Case cited to maintain this Declaration, but such where the Possession is laid by way of Inducement to the Action, or such which have been brought against Tort Feasors, or where there hath been a Seisin in Fee alleged, and even most of those Cases after *Merdia*.

Cro. Car.
138.

The Cases are, viz. between Skevil and Averie, it was an Action of Trespass, Assault and Battery.

The Defendant pleaded that he was possessed of a House for a Term of Years, and that the Plaintiff would have thrust him out, and thereupon *molliter manus imposuit*, and so justifies in Defence of his Possession, and upon a Demurrer he had Judgment; for tho' the Defendant did not shew who made the Lease, or how many Years he had in it, or any particular Estate, yet his Plea was held good, because his setting forth a Possession for Years, was but an Inducement to his Justification, and the Possession and not the Title was the principal Matter in that Case.

2 Cro 52.
Yelv. 74.

But where an Interest is pleaded by the Defendant, and he claimeth a Title, it must certainly be set forth; and this is the very Distinction made in *Babington's Case*, 1 Roll. Rep. 13.

Now in the Case at Bar, 'tis not the Possession which entitles the Plaintiff to the Common; for if so, then *de injuria sua propria* had been a good Plea, which no Man will affirm.

Pasch. 33.
Car. 2.
B. R. Rot.
109.

The Case of *Brooking and Bond* is the same with this, but only 'tis said there, that *seisus fait* of a House and twenty Acres of Land; which Words must be intended of a Fee-simple Estate: And afterwards when he says, *de jure habere debuisset Common*, those Words amount to a Prescription.

Cro. Car.
575.

In *Sands and Trefusis Case*, the Action was for diverting of a Water-course, but there was a Seisin in Fee alleged in the Bill, and so *de jure habere debuisset*, &c. was well enough; but no Judgment was given,

In

In Scavage and Hawkins's Case, which was Debt for Rent on a Lease for Years made by the Father, who was Tenant in Tail, and died seised of the Reversion which descended to the Plaintiff; Exception was taken that he did not set forth the Commencement of the Estate, but it was not allowed because it was an Action founded upon the Contract, and he had shewn enough to entitle himself to it, the Land being not in Dispute; but this was after a Verdict wherein the Right had been tried; so were the Cases mentioned in the * Margin.

In Dent and Oliver's Case, which was for disturbing of the Plaintiff from Taking of Toll in a Fair: An Exception was taken that he did not set forth a Grant or Prescription, &c. but it was held Good, because he said that he was seised in Fee of the Manor, &c. and of a Fair to be held there every Ascension-Day.

So that those Cases are not applicable to that now in Question, because in most or all of them a Title is set forth by Way of Seisin in Fee, but here the Right of Common is claimed without any Title but only on a bare Possession.

Econtra. It was argued that it was not material to set forth any Right or Title to which the Defendant might give a particular Answer, it being sufficient to ground this Action upon the Right of Possession alone against a Wrong-doer; especially since upon the general Issue the Plaintiff must prove his Title, or be Nonsuit; so that this is only a summary Way to try the Matter; and all Declarations for stopping of Ways, diverting Water-courses and Disturbances in Commons, are drawn and founded upon the Possession without shewing of a Title.

'Tis true, in Actions for Trespasses, if the Plaintiff will lay any Charge upon the Land, then he must set forth his Title, as if the Action is brought against the Owner thereof; but when against a Wrong-doer, there the Ownership of the Land is not in Question, so that a Possession alone is sufficient Ground for that Action.

This was the Difference taken by my Lord Coke in Buckmer's Case, viz. That in Real Actions founded upon a Wrong, the Plaintiff need not set forth a Title, but 'tis sufficient to shew a Possession against a Wrong-doer; and if upon the Evidence at the Trial the Plaintiff cannot prove a Title, he will never recover.

Cro. Car.
571.

* Franklin
versus Webb.
B. R. Pasch.
33 Car. 2.
Rot. 538.
St. John
versus Moody.

1 Vent. 274.
319, 356.
2 Cro. 43.

9 Rep. 87. b.

He

He was of the same Opinion in Babington's Case, and there he took another Difference between an Inducement to an Action, and to a Matter of Title; for he held, That if an Action on the Case was brought for a Nuisance done to a Freeholder or in a Way, 'tis sufficient to declare, that he was possessed, &c. for a Term of Years, which however uncertain, is only a Conveyance to the Action.

Besides this Way of declaring gives the Defendant an Opportunity to set forth his Title, and to demand Judgment against the Plaintiff for that he had shewed only a Possession without a Title.

Fitz. tit.
Brief. pl. 674.

In Mich 13 Ed. 3. The Abbot of Gloucester declared, That he was seised in the Manor of M. &c. by Reason whereof he was intitled to have Estrays, and that the Defendant had taken two Horses in the said Manor, which the Abbot claimed, &c.

An Exception was then taken, because he had not claimed this franchise as appendant to the Manor, nor by Grant; but that was not the Question, the Defendant must answer the Wrong alledged to be done by him in taking of the Horses.

Owen 109.

And for later Authorities it has been held to be the usual Course thus to declare even in Actions of different Natures. As in the Case of Escat and Lawney, which was brought upon a Lease for Years of the Toll and Profit of a Market and Fair in Thetbury, and the Defendant disturbing of him, &c.

Exception was taken to that Declaration, because the Plaintiff did not shew that the Lessor was seised in Fee at the Time of the Demise made to the Plaintiff; but it was not allowed, because the Title of the Land was not in Question, but Damages were to be recovered for an Injury done.

Cro. Eliz.
335, 419.

So for a Disturbance in an Office the Plaintiff had mistaken his Title, and in a special Verdict, another Title was found for him different from that on which he declared, yet he had Judgment, notwithstanding this Variance, because the finding the Title was held to be superfluous; it was the Disturbance, &c. which was the Occasion of the Action.

So likewise upon the Statute of Ed. 6. for not setting out of Tithes the Plaintiff seldom or never shews any Title, but generally that he is proprietarius of such a Place, and this is held well enough, for he cannot recover without shewing a Title upon the Evidence at the Trial.

1 Roll. Rep.
393.

And lastly in Trespass for a Battery, per quod servitium amisit, the Defendant pleaded in Bar, that he was possessed

of a House in which he had Lights, and that the Servant of the Plaintiff was building another House on the Wall to obstruct the said Lights, and that he cum baculo thrust him away; and upon a Demurrer an Exception was taken to this Plea, that the Defendant had not set forth of what Estate he was possessed.

'Tis true, in this last Case it was held to be ill, because it was in a Plea in Bar, and that no Issue could be taken upon it as pleaded; but had it been in a Declaration, or in an Action on the Case for a Nuisance, it had been well enough; because it would then have been only an Inducement to the Action.

But the Case of St. John and Moody was the very same with this; 'tis true, it was after a Verdict, but the Court did not rely upon that; so was the Case of Bound and Broken, and that of Heblethwaite and Palmes, in both which the Declarations were upon a Possession generally without a Title; and held good. 2 Jones 148.
3 Mod. 48.

Tamen quære, for in the last Case 'tis, that he was possessed de antiquo aquæ cursu, which implies a Prescription.

So in Trinity-Term, 2 Jac. Rot. 28, between Cary and Brockhurst, the Bailiff of Westminster shewed that he had a Franchise, but did not say how he came to have a Return of Writs, or that he was seised of the Bailiwick; and yet had Judgment, which was affirmed in the Exchequer-Chamber. 1 Show. 17.
377.

Curia. This Declaration might have been better, for 'tis something difficult to understand what is here intended by the Word Tenemento of which the Plaintiff saith he was possessed; for he sets forth that it contained a Fulling-Mill and Corn-Mill, &c. and a Piece of Land called Wythybed, &c. and then prescribes to have Common in Mendip, as belonging to the said Tenement, for Cattle Levant and Couchant thereon, which is impossible; for Cattle cannot be Levant and Couchant on a Mill.

In the next Place he hath not set forth what Quantity of Land is contained by the Name of Wythybed, which he ought to have done, especially where the Prescription is for a Right of Common belonging to it.

But upon the whole Matter the Declaration was adjudged to be good, and that the Plaintiff need not to set forth his Title either by Prescription or Grant, because 'tis an Action grounded upon the Possession against a Wrong-doer, to which Action, a Title would be only an Inducement.

2. That

2. That he need not set out any Title whatsoever because (as to the Defendant who did the Injury) it stands indifferent whether the Plaintiff is Owner of the Soil or not; his Business is to answer the Wrong alledged to be done by him.

'Tis true, if it had been upon a special Pleading, as in Trespas for distraining of his Cattle, and the Defendant had pleaded that he was Owner of the Soil, and so justified the Taking, the Plaintiff in such Case must have replied and shewed a Title either by Grant or Prescription, or some other Conveyance.

¹ Vent. 274.

² Lev. 248.

And lastly, this Matter is not traversable, for upon the general Issue, a right of Common must be proved and given in Evidence, otherwise the Plaintiff cannot maintain his Action, but what Right is not material; and the Case of St. John and Moody was relied on as full in Point; the like between Blockley and Slaughter, Hill. 4. & 5 Willielmi, in the Common Pleas, Rot. 1771. and so the Judgment in this Case was affirmed, and the Law settled in this Point.

T H E

T A B L E

T O T H E

Fourth Part of *Modern Reports*.

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